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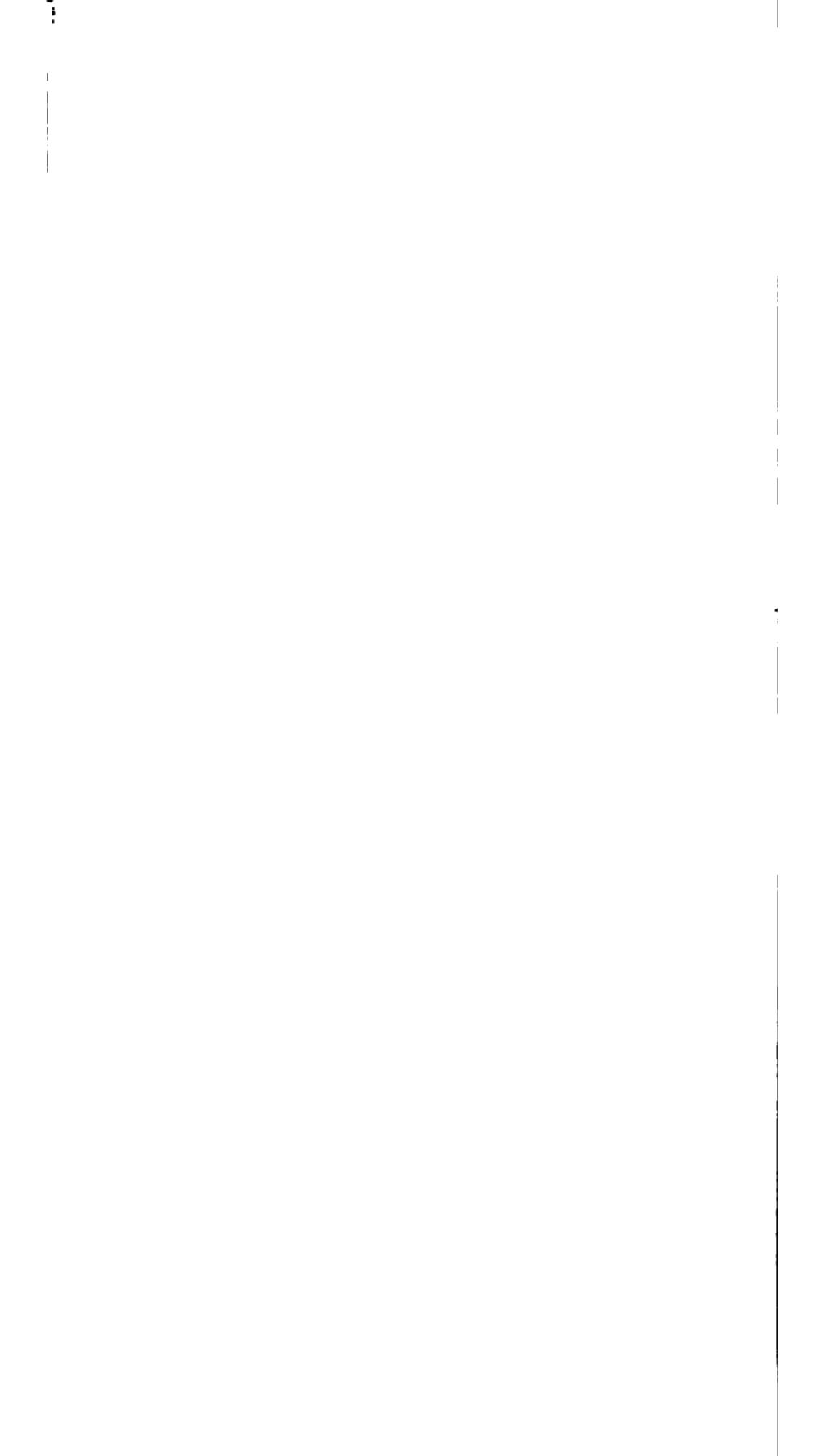
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REPORTS OF CASES

IN LAW AND EQUITY, ARGUED AND DETERMINED IN THE

SUPREME COURT OF GEORGIA,

AT ATLANTA.

PART OF JULY TERM, 1876.

VOLUME LVII.

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NOTE.—By Act of 1866 (section 4270 of the Code) the decisions of the Supreme Court are required to be announced by written synopses of the points decided. The decisions thus announced from the bench by Judges BLECKLEY and JACKSON, are made the head-notes to the cases. The decisions announced by Chief Justice WARNER, are published as his opinions, the head-notes being made by the reporter. All other head-notes by the reporter are designated by (R.)

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF GEORGIA,
AT ATLANTA.

JULY TERM, 1876.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.
L. E. BLECKLEY, JUDGE.
JAMES JACKSON, “

SAMPSON B. KING, plaintiff in error, *vs.* CHARLES H. COURSON, defendant in error.

(JACKSON, Judge, having been of counsel, did not preside in this case.)

After a partnership has been dissolved, and one partner has agreed to pay all the joint debts, and has been compensated by the other for that agreement, if firm assets, undivided and undisposed of, and in which both have an equal interest, remain in the possession of the former, and he excludes the latter from sharing in them, the latter may maintain a bill to compel a just and proper account and division.

Equity. Partnership. Before Judge CLARK. Lee Superior Court. March Term, 1876.

Reported in the opinion.

HAWKINS & HAWKINS; WEST & KIMBROUGH, for plaintiff in error.

R. F. LYON; ALFRIEND & ARMSTRONG, for defendant.

King *vs.* Courson.

BLECKLEY, Judge.

The defendant put in property, and the complainant skill and labor. Thus the partnership was formed. The property was to be firm property when paid for out of the net proceeds of the business. After operating for some time, the partnership was dissolved by mutual consent.* In the contract of dissolution, the complainant gave up his interest in certain of the assets, including, it would seem, the property brought in by the defendant as original capital, and the defendant agreed to pay all the firm debts. But some of the proceeds of the business were left undivided, and in these the parties still have an equal interest, and the defendant has the possession, treating them as his own. This, we understand, to be the substance of the bill. The court dismissed it at the hearing; and we are told that it was because there is no averment that these proceeds, now in question, are over and above the net proceeds which, by the original contract, were to be applied in payment for the property put in by defendant. True it is, there is no such averment, but we cannot think it necessary, in face of the two allegations, that by the terms of dissolution all the debts were to be paid by defendant, and that the parties have, in these remaining proceeds, an equal interest. If, at the time of dissolution, the firm owed the defendant for property, his agreement to pay all the debts was, *ipso facto*, payment of that debt. And if both parties still have an equal interest in certain of the assets, they do not and cannot belong to the defendant alone for any reason whatever. If the bill is true, as the motion to dismiss conceded, there was error in dismissing it.

Judgment reversed.

Lellyett *vs.* Markham.

JOHN LELLYETT, plaintiff in error, *vs.* WILLIAM MARKHAM, defendant in error.

The opinion of the presiding judge, expressed in his charge to the jury, that an important witness of the plaintiff, on the material question at issue, was "apparently interested," is error, and section 3248 of the Code expressly requires this court to grant a new trial therefor.

New trial. Charge of court. Before Judge PEEPLES. Fulton Superior Court. April Term, 1876.

Reported in the opinion.

B. F. ABBOTT; JOHN T. GLENN, for plaintiff in error.

D. F. & W. R. HAMMOND; ARNOLD & ARNOLD, for defendant.

JACKSON, Judge.

This was a suit brought by the plaintiff against the defendant for the recovery of fees. The main question was, whether plaintiff had been employed by defendant or whether he merely represented other counsel, and was to look to them for his fees. On this issue the evidence was conflicting, plaintiff swearing that he was employed by defendant, and defendant swearing that he was not. The counsel, Collyer, whom the defendant swore that plaintiff represented and looked to for fees, sustained the plaintiff fully on the point that he had been employed. The court charged the jury, among other things, as follows: "You have heard the testimony of different witnesses, Collyer and Lellyett, and all apparently interested, and are said to have been present at the conversation." By section 3248 of the Code, the judge trying the case is positively prohibited from expressing or intimating his opinion on the facts, and if he does so this court is positively required to hold it error, to reverse the judgment and to grant a new trial: Code, section 3248.

The court here told the jury that Collyer was apparently in-

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tered; this was an expression of opinion on a fact in the case; certainly an intimation of an opinion, and we have no discretion but are required to grant a new trial by the plain words of the statute. The testimony of Collyer was on a vital point, on which plaintiff and defendant were at issue, and plaintiff was entitled to have the full benefit of his testimony unaffected by the judge's opinion of his interest in the case. It was for the jury to say whether he was or was not interested.

We incline to think that the weight of the evidence is against the verdict any way, as Markham, in one of his numerous letters to plaintiff, admitted that he employed plaintiff, and as such subsequent employment was in entire harmony with the fact that plaintiff first went into the case to represent Collyer. But we would not have interfered with the verdict and controlled the discretion of the presiding judge in refusing the new trial, on this ground alone. The other point, however, leaves us no alternative but to grant the new trial.

Judgment reversed.

DAVID J. DOBBS, plaintiff in error, *vs.* GUSTAVUS A. PROTHRO *et al.*, defendants in error.

Where a complainant alleges in his bill that execution has issued against him in favor of the executors of a deceased testator; that such executors are indebted to him, as one of the legatees of the deceased, in a sum greater than that named in the execution; that the estate is free from debt, and that said executors are insolvent:

Held, that the chancellor erred in refusing the injunction and dismissing the bill.

Equity. Injunction. Administrators and executors. Before Judge KNIGHT. Cobb County. At Chambers. July 20th, 1876.

Reported in the decision.

DAVID IRWIN; GEORGE N. LESTER, by CANDLER & THOMSON, for plaintiff in error.

Dobbs *vs.* Prothro *et al.*

W. T. & W. J. WINN, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants, praying for an injunction to restrain the collection of an execution issued upon a common law judgment obtained against him. On the hearing of the motion for an injunction on the allegations contained in the complainant's bill, the chancellor refused to grant it. Whereupon the complainant excepted.

The complainant's equity, according to the allegations in his bill, is that the defendants, as the executors of Evan Prothro, sued him for the sum of \$370 00, for which he was indebted for money received by him for said executors, for the rent and sale of the Powder Springs place in Cobb county, by the direction and request of said executors, and in March, 1875, obtained judgment against him for that amount; that the complainant's wife was one of the legatees of Evan Prothro, who died in South Carolina in 1864, leaving a considerable estate; that the defendants, as executors of their testator, have in their hands or have appropriated to their own use, more than \$2,500 00 belonging to complainant as one of the legatees of said estate; that there are no outstanding debts against the estate of Evan Prothro, or any just or legal reason why defendants should collect said judgment from the complainant, and that said executors are *insolvent*. The complainant does not seek to attack the judgment rendered against him in favor of the executors of Prothro, but only seeks to restrain the collection of that judgment, upon the ground that it would be inequitable and unjust to do so, in view of the allegations contained in his bill.

Assuming that the judgment against the complainant was properly obtained, as the bill does, still there would be no necessity for its collection by the executors, merely for the purpose of paying it back to the complainant as one of the legatees of their testator, and especially ought not the execu-

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tors to be allowed to collect the amount of the judgment out of the complainant as a legatee, when they are insolvent and unable to respond to him for that part of his legacy if they shall be permitted to obtain possession thereof: *Carter vs. McMichael*, 20 *Georgia Reports*, 96; *Moody vs. Ellerbie, administrator*, 36 *Ibid.*, 666; *Dorsey vs. Simmons*, 49 *Ibid.*, 245.

In view of the allegations contained in the complainant's bill, assuming the same to be true, (as the demurrer thereto does) the chancellor erred in sustaining the defendants' demurrer to the complainant's bill for want of equity, and in refusing to grant the injunction prayed for, inasmuch as that judgment was contrary to the well established principles of equity as recognized by this court in the cases herein-before cited.

Let the judgment of the court below be reversed.

JAMES D. THOMPSON, plaintiff error, *vs.* EDWARD B. CHAPMAN, defendant in error.

1. In an affidavit made to obtain a warrant to dispossess a tenant, it is sufficient to describe the premises as "a house and lot at East Point, in said county and state, being the place where J. D. Thompson (the tenant) now resides."
2. That the premises are not described in equivalent language in a deed offered in evidence by the landlord, will not render the deed inadmissible, where there is evidence *aliunde* going to show that its descriptive terms embrace the same property.
3. It is not necessary, on an issue of tenancy or no tenancy, to prove title from the state.
4. If a tenant, upon being informed that a purchase from his landlord is contemplated, and that it is dependent upon his agreeing to yield possession at the end of his term, consents to do so, and the person about to purchase acts upon that consent, making the purchase, and thereupon the tenant repeats the promise, both to the vendor and vendee, it is an attornment, and is equivalent, in law, to an express contract to hold under the vendee for the residue of the term.
5. The residue in this case being one month, it was competent for the vendee,

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after the month expired and after the tenant had refused to surrender possession, to treat him as his lessee for a month, and obtain a warrant for his removal accordingly.

Landlord and tenant. Deeds. Evidence. Attornment. Before Judge HOPKINS. Fulton Superior Court. October Term, 1875.

Chapman sued out a warrant to dispossess Thompson, as tenant holding over of certain property. Plaintiff's affidavit described it as "a house and lot at East Point, in said county and state, it being the place where J. D. Thompson now resides;" it alleged that defendant had leased the premises from plaintiff for the space of one month, the time expiring December 31st, 1871; and that since that date plaintiff had demanded possession, which defendant refused to deliver.

Defendant filed a counter-affidavit, in which he denied that he held the premises in dispute under plaintiff, either by lease, at will, or by sufferance.

On the trial of the issue thus formed, the evidence for plaintiff made, in brief, the following case:

In October, 1870, J. R. Chapman, who was then in possession of the property, rented it to defendant for \$25 00 per month. Chapman, who was a merchant, also sold out his stock of goods to defendant. The purchase money was never paid, and afterwards he bought back a half-interest in the business. No money was paid therefor on account of defendant's larger indebtedness to him. In November, 1870, a contract was entered into between these parties, by which defendant was to purchase the lot in dispute and pay \$2,500 00 therefor, early in 1871. In the summer of 1871, defendant stated that he could not pay for the place, and proposed that Chapman take it back, and this was accordingly done. Defendant never paid any of the purchase money for such property. There was no agreement to credit the half interest in the store on the debt for the land. In 1871 the copartnership was dissolved, and on a final settlement defendant was found to be indebted to Chapman \$48 00, which has not yet been

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paid. During the of fall 1871, plaintiff proposed to buy the place from his brother, the said J. R. Chapman. They went together to see defendant, and plaintiff stated that he wished to buy the property, and asked defendant if he would deliver possession; the latter replied that he would, and for plaintiff to "go ahead and buy it; he would not be in the way;" he further stated that he had no claim upon the property, as the trade between him and Chapman had been rescinded. Plaintiff thereupon purchased the place and took a deed therefor from the said Chapman. Afterwards, on December 1st, 1871, he informed defendant that he had made the purchase, and that he was willing to allow him (defendant) to retain possession until January 1st, 1872, the end of his term, provided he would give it up at that time. To this defendant agreed. On December 25th he stated to plaintiff that he had been disappointed in getting another place for which he had been negotiating and could not give up possession, and he still refuses to do so.

Plaintiff introduced the deed from J. R. Chapman and closed. Defendant made a motion for a non-suit, which was overruled.

Defendant's testimony only differed from the above statement in the following particulars: 1st. "That he had paid \$200 00 on the purchase money of the place, besides erecting \$400 00 worth of improvements thereon, and that the half interest in the business, resold to Chapman, was also to be credited on the amount of such purchase money. 2d. When the proposal was made for Chapman to take back the property, defendant stated that he had paid the aforesaid amounts, and that their business had been unprofitable, but that he would agree to take the store and assume the liabilities of the firm, and that Chapman should take the house and lot, provided the latter would allow him to occupy the premises the next year and until he could get another place. And that the settlement was made with this understanding. 3d. That, when asked by plaintiff if he would give up possession of the property on January 1st, 1872, he replied that he would, pro-

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vided he could get another place for which he was negotiating, and failing to do so, he held under the contract with J. R. Chapman. 4th. That he never rented from plaintiff, or had any other conversation with him about the property.

The jury found for plaintiff the premises in dispute, and \$540 00 for rent. Defendant moved for a new trial on the following, among other grounds: 1st. Because the court erred in overruling a motion made by the defendant to dismiss the warrant for insufficient description of the premises. 2d. Because the court erred in admitting in evidence the deed from J. R. Chapman to the plaintiff, it being objected to on the ground that it did not show, from its terms, that it conveyed the premises in dispute, and because there was no evidence that the title ever was in said Chapman. 3d. Because the court erred in overruling the motion for a non-suit, since it was not shown that defendant was the tenant of plaintiff. The motion for a new trial was overruled, and defendant excepted.

T. P. WESTMORELAND; J. T. PENDLETON, for plaintiff in error.

JAMES BANKS, J. T. GLENN, for defendant.

BLECKLEY, Judge.

All the points discussed by counsel are disposed of in the head-notes. The rulings of the court would seem to need nothing by way of explication or comment. The case in 19 *Georgia Reports*, 534, besides being rather extreme on the measure and exactitude of proof, is distinguishable from this in the fact that the terms of a specific agreement are here proved. The tenant was to hold till a given time and then go out. The new landlord was accepted expressly. After that if he was not the lord, there was no lord at all.

Judgment affirmed.

Walker vs. Burt et al.

WILLIAM S. WALKER, plaintiff in error, vs. O. P. BURT et al., defendants in error.

1. The lien on saw-mills under section 1985 of the Code, must be prosecuted within one year after the debt becomes due, and if the first proceeding to foreclose, made within twelve months, be defective and is dismissed, it cannot be renewed within six months thereafter, under section 2932, so as to save it, unless the renewal be also within one year after the debt falls due. Section 2932 of the Code applies only to ordinary suits and remedies, and not to extraordinary summary remedies like the foreclosure of such lien.
2. Even if properly foreclosed, the lien made by a person in possession, who was neither the true owner, nor his agent, nor his lessee, would not be good against the true owner; and when the facts show that the mill had been sold by agreement, after bill in equity filed by the true owner to enjoin the enforcement of the lien, and the money raised was to stand in the place of the mill itself, and to be distributed according to the equities of the several parties, and that the person in possession of the mill, and who had given the lien, took possession with the understanding that he was to have no title until he had paid for it, the true owner of the mill would take the money in preference to the holder of the lien.

**Liens. Statute of limitations. Before Judge HANSELL.
Berrien Superior Court. March Term, 1876.**

Reported in the opinion.

D. H. POPE, for plaintiff in error.

IRA E. SMITH ; ORR & LEWIS, for defendants.

JACKSON, Judge.

Two questions are made by the record in this case. First, does section 2932 of the Code, which authorizes suits to be renewed within six months after their dismissal, apply to summary proceedings to foreclose liens upon saw-mills? and, second, will the title of the true owner of such saw-mill prevail over a lien upon it made by one who contracted for it but took no title until it was paid for, it not being paid for?

The foreclosed lien was levied upon the mill; the owner brought bill in equity to enjoin the sale; by agreement of all

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parties the mill was sold, the proceeds in the hands of the sheriff to stand precisely in the place of the mill and be distributed equitably according to the respective rights of the parties. The lien was created by a party who had contracted for the mill but had not paid for it, and was to take no title until it was paid for, taking only bond for titles when the purchase money was paid. On the trial of the rule, Walker, who held the lien, dismissed his first proceeding to foreclose it on account of some defect therein, and foreclosed again. The first was in time—within one year from the time the debt became due; the last was not within the one year, but within six months of the first.

1. In respect to the first question, we think that the act in relation to the renewal of suits dismissed does not apply to these summary proceedings to foreclose liens. These acts, creating these liens and providing for their immediate and rapid enforcement, are in derogation of common right and must be strictly construed: 1 *Kelly*, 317; 54 *Georgia Reports*, 137. The statute declares they must be prosecuted within one year; if we should apply the renewal act, Code, section 2932, to them, the time would be extended to eighteen months. That act was in existence when these summary remedies were passed in aid of these liens and no reference is made to it. It is said that this court applied the provision in renewal of suits to *certioraries*. That is true, but the writ of *certiorari* is an old common law writ, in existence long before the renewal act was passed and clearly within its provisions.

2. In regard to the second point, we think that as a general and safe rule, no man can give a lien on that which he does not own, unless he be agent for the owner. The statute, Code, section 1991, contemplates that he must be owner, agent or lessee; if lessee he could only give the lien to bind the property for the lease—the extent of the lease—no further. This is ruled distinctly in 11 *Georgia Reports*, 45. But Walker is not lessee, nor is he owner, nor is he agent of the owner; he is merely a conditional purchaser, and the condition on which title was to vest in him was not fulfilled. He has not paid

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the purchase money, so that the question is, can such a one create a lien on property he has not paid for, to the overthrow of the title of the owner? If the question had not been ruled, we should think it would be strange law to hold that he could, but it has been virtually settled in 23 *Georgia Reports*, 205, and 29 *Ibid.*, 408. We do not think the question is at all altered by the fact that the lien is on the property, the mill; the true question is, who put that lien on the mill? Did he have authority to do so? If not, of course the lien cannot stand.

Let the judgment be affirmed.

ANNA R. DEGRAFFENRIED, plaintiff in error, *vs.* THE BRUNSWICK AND ALBANY RAILROAD COMPANY, defendant in error.

A receiver cannot be sued for the assets placed in his hands, or be disturbed in the possession or management thereof, without first obtaining leave of the appointing court.

Equity. Receiver. Before Judge HANSELL. Berrien Superior Court. March Term, 1876.

Reported in the decision.

D. H. POPE, for plaintiff in error.

W. S. BASINGER, by brief, for defendant.

WARNER, Chief Justice.

This was a proceeding in the nature of a bill in equity, filed by the complainant in behalf of herself and son, as the widow and child of Spencer F. deGraffenried, against John Screven, receiver of the Brunswick and Albany Railroad Company, to recover damages for the killing of the said Spencer deGraffenried, in the county of Berrien. The com-

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plainant alleges that the said receiver of the aforesaid railroad company was appointed by the superior court of Glynn county, in this state, to take charge of, manage and run said road for the benefit of the owners and creditors thereof; that whatever damages she may be entitled to recover for herself and ward will be lost to them by reason of the insolvency of said railroad company and its owners, therefore she prayed that the judge of the superior court of Berrien county would grant an injunction enjoining said receiver from paying out and to hold in his hands a sufficient amount of the accrued and accruing assets of said railroad company as will fully meet any judgment that may be rendered in her favor. On the 3d of September, 1873, the judge of the southern circuit ordered an injunction to issue as prayed for, subject to the further order of the court, with leave to defendant to move a revocation of said order on ten days' notice to plaintiff's attorney. The defendant filed a demurrer to the complainant's bill, and made a motion to dissolve the injunction. The court sustained the motion, on the ground that there was no allegation in the complainant's bill that authority or permission to sue said receiver had been granted by the court appointing said Screven receiver, whereupon the complainant excepted.

There was no error in sustaining the demurrer and dissolving the injunction on the statement of facts contained in the record. Screven, the receiver, was the officer and servant of the superior court of Glynn county, which had appointed him, was bound to obey its direction, and was responsible to no other tribunal: Code, section 5150. That a receiver, appointed by a court of chancery, cannot be sued for the assets placed in his hands, or be disturbed in the possession and management thereof, without first obtaining leave of the court appointing him, is not an open question in the courts of this state: *Field et al., vs. Jones et al.*, 11 Georgia Reports, 413; *Screven vs. Clark*, 48 *Ibid.*, 41; *Henderson vs. Walker*, 55 *Ibid.*, 481; *Thurman vs. Cherokee Railroad Company*, 56 *Ibid.*, 376.

Let the judgment of the court below be affirmed.

Wheeler *vs.* Harrison.

A. W. WHEELER, sheriff, plaintiff in error, *vs.* HENRY HARRISON, defendant in error.

1. A rule *nisi* obtained by defendant to set aside a judgment, will not protect the sheriff in not levying the *fi. fa.* and making the money, no *supersedeas* having been obtained, though the defendant served the sheriff with a copy of the rule.
2. After rule absolute against the sheriff, before he can be attached for contempt, a rule *nisi*, calling upon him to show cause why he should not be attached, must be sued out and served upon him.

Rule *nisi*. Sheriff. Levy and sale. Attachment. Before Judge CLARK. Sumter Superior Court. October Adjourning Term, 1876.

Reported in the opinion.

J. A. ANSLEY; W. A. HAWKINS, for plaintiff in error.

R. F. LYON; S. D. IRVIN, for defendant.

JACKSON, Judge.

A rule *nisi* was served upon the sheriff to show cause why he had not made the money on plaintiff's *fi. fa.* The sheriff showed in his answer that defendant had moved to set aside the judgment, and that defendant had served him with a copy of his motion, or rule *nisi*, signed by the judge. No *supersedeas* was granted. The court below made the rule absolute. We think the court did right. It will not do for defendants to move rules *nisi*, granted as matter of course usually, obtain no *supersedeas*, and notify the sheriff simply that they have made the motion, and thus stop the plaintiff's *fi. fa.* from proceeding. The sheriff should have gone on and executed the process of the court, unless the rule *nisi* had instructed him not to do so. After the rule was made absolute, the sheriff was attached without being served with a rule *nisi* to show cause why he should not be attached for contempt. We think this was error, and reverse the judgment on that ground.

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The sheriff might show some reason against the attachment, and should have the opportunity to give it.

Judgment reversed.

JOSEPH H. LAMBERT, plaintiff in error, *vs.* **H. W. SMITH**, defendant in error.

1. Whether a judgment by default will be set aside or not, is a question addressed to the sound discretion of the court below, and this court will not, as a general rule, interfere, unless such discretion has been grossly abused.
2. On the bill of exceptions were two entries; the first being "filed in office June 10th, 1876," was unsigned. The second, immediately following the first, certified that the bill was withdrawn by attorneys for plaintiff in error, and re-filed. This entry was dated June 12th, 1876, and signed by the clerk of the superior court:

Held, that the clerk had no authority to certify to the withdrawal of the bill of exceptions, and such entry is therefore of no effect.

JACKSON, Judge, dissented on the ground that the entry of withdrawal was part of the entry of filing, and that the one could not therefore be considered without the other. (R.)

Judgments. Practice in the Supreme Court. Before Judge CLARK. City Court of Atlanta. June Term, 1876.

The following, taken in connection with the decision, sufficiently reports this case:

The bill of exceptions had two entries upon it. The first was "Filed in office June 10, 1876," and was without any signature. The second was as follows: "This bill of exceptions this day withdrawn by attorneys of Lambert, and re-filed—June 12, 1876. James D. Collins, C. S. C."

Defendant's counsel moved to dismiss the bill of exceptions on the ground that it lost its character as such by the withdrawal, and a subsequent re-filing could not give it new vitality.

Counsel for plaintiff in error insisted that there was no authority given to the clerk to enter the withdrawal of a bill of exceptions thereupon, and such entry should, therefore, not be regarded.

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The motion was overruled, and the principle enunciated in the second head-note announced.

E. N. BROYLES; G. F. WOOTEN, for plaintiff in error.

JOHN L. HOPKINS; GLENN & ANGIER; J. T. GLENN, for defendant.

WARNER, Chief Justice.

This was a motion to set aside a judgment in the city court of Atlanta. It appears from the record and bill of exceptions that a suit was pending in said city court in favor of Smith against Lambert, the defendant; that in the forenoon of the first day of the trial term of said court, when the case was called on the docket for trial it was in default, and there being no attorney's name marked on the docket for the defendant, nor plea of any sort to be found in the clerk's office, the court, after hearing the plaintiff's evidence, awarded a judgment in favor of the plaintiff for the sum of \$150 00. During the same term of the court the defendant made a motion to set aside the judgment so rendered as aforesaid, offering to pay all costs, on the ground that he had a meritorious defense to the action, which he set forth, and filed his own affidavit that he expected to be able to establish the facts so set forth on the trial of the cause. The defendant further states in his affidavit that on being sued in the case he employed Thrasher & Thrasher, attorneys at law, to defend the same, and relied on them to prepare the defense; that late Saturday afternoon, before the meeting of the present term of the court on Monday, hearing that Thrasher & Thrasher would not be at the court, and that Broyles & Wooten were representing the cases of Thrasher & Thrasher, he went to their office about nine o'clock on Monday, the first day of the court, to see them about the case; found them at the superior court, but on account of their being engaged in other cases, and not being personally acquainted with them, did not get to speak to them about his case until about eleven o'clock, A. M.

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Immediately thereafter Broyles went to the city court and found that judgment had been rendered against him. Upon this showing of the defendant, the court refused to set aside the judgment, whereupon the defendant excepted.

The judgment was rendered at the trial term of the case, there being no issuable defense filed on oath by the defendant. The motion to set aside that judgment for the reasons stated, was a question addressed to the sound discretion of the court below. That this court has the power to control that discretion is readily admitted, but as a general rule, this court will not interfere with the exercise of that discretion unless it has been grossly abused. The court before which the proceedings are had has a much better opportunity to judge of the conduct and motives of the parties before it than a reviewing court, which is governed by the record alone, and that court also had a much better opportunity to judge of the materiality of the defendant's alleged defense, in view of the plaintiff's evidence offered before it at the trial, than this court, when that evidence is not set forth in the record. In this case it does not appear when the defendant employed Thrasher & Thrasher to defend the suit. "On being sued in the case," is too indefinite. The defendant was required to show full diligence on his part. Besides, it is a significant fact that the defendant did not procure the affidavit of Thrasher & Thrasher as to the time and terms of their employment to defend the suit, instead of relying upon his own indefinite statement alone. There was not such an abuse of the discretion of the court below in refusing to set aside the judgment, on the statement of facts disclosed in the record, as will authorize this court to interfere and control it. Courts must necessarily be clothed with a large discretion in conducting the business therein, and this court will be slow to interfere with that discretion, unless it is manifestly apparent that there has been a gross abuse of it.

Let the judgment of the court below be affirmed

Rivers *vs.* The State of Georgia.

HENRY RIVERS, plaintiff in error, *vs.* **THE STATE OF GEORGIA**, defendant in error.

(BLECKLEY, Judge, was providentially prevented from presiding in this case.)

An indictment for simple larceny in stealing hogs is sufficiently certain in describing them, if they be so described as to be identified by the owner.

Criminal law. Indictment. Before Judge CLARK. Lee Superior Court. November Adjourned Term, 1876.

Reported in the opinion.

W. A. HAWKINS; GEORGE KIMBROUGH; ALFRIEND & ARMSTRONG, for plaintiff in error.

C. F. CRISP, solicitor general, for the state.

JACKSON, Judge.

The indictment described the hog stolen as a black hog, mark unknown, of the value of \$4 00, and the property of one G. K. & T. R. Taylor. The court below held it good, and error is assigned to this judgment.

The Code is very broad ; the only description necessary is such as that the owner may identify the hog, and this was done in this case : See Code, section 4400 ; 44 *Georgia Reports*, 300.

Judgment affirmed.

F. N. CHISHOLM, plaintiff in error, *vs.* **THE ATLANTA GAS LIGHT COMPANY**, defendant in error.

1. A company which produces and furnishes gas is bound to use such skill and diligence in its operations as is proportionate to the delicacy, difficulty and nature of that particular business.
2. Upon the trial of an action for damages resulting from an explosion of gas, the question as to whether such diligence was used should be left to the jury ; and where the facts in evidence would justify the inference of negligence, to order a non-suit was error.

Chisholm vs. The Atlanta Gas Light Company.

Non-suit. Practice in the Superior Court. Negligence. Before Judge HOPKINS. Fulton Superior Court. October Term, 1875.

Reported in the decision.

T. P. WESTMORELAND, for plaintiff in error.

COLLIER & COLLIER; A. W. HAMMOND & SON, for defendant.

WARNER, Chief Justice.

The plaintiff, Chisolm, sued the Atlanta Gas Light Company, in the justice's court, for the sum of \$100 00, for damages done to his store-house in the city of Atlanta, by the explosion of gas. The justice gave judgment for the defendant. The plaintiff entered an appeal to the superior court. On the trial of the appeal, the court, after hearing the plaintiff's evidence, on motion of the defendant, non-suited the plaintiff, whereupon he excepted.

1. There was no dispute that the plaintiff's store-house was injured the amount claimed by the explosion of gas therein, but the question is, whether there was sufficient evidence to make out a *prima facie* case of negligence on the part of the defendant to entitle the plaintiff to go to the jury under the law. It appears from the evidence that the store-house had been vacant two or three weeks before the explosion, which took place on the 5th of January, 1874. On the evening the explosion took place, the plaintiff had rented the store-house to some colored people for the purpose of having a supper there; the colored people did not use gas that night, but used candles. Rhodes, defendant's superintendent, a witness for the plaintiff, stated that plaintiff had gas fixtures in his store-house; that on the 28th of December, 1873, the defendant was notified that the house was vacant and that gas was no longer needed, and defendant was ordered to cut it off, which was done on that day by means of a meter-cock in

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plaintiff's cellar. The witness stated that there were two ways to cut off the gas from plaintiff's house, the one by a meter-cock which was the property of the plaintiff, but was used by the defendant also; the other, by a service-cock which was under the curb-stone, and which was the property of defendant and under its exclusive control; that if the gas had been cut off at the service-cock on the 28th of December, 1873, instead of at the meter-cock, the explosion in plaintiff's house could not have occurred; that in cutting off gas the defendant sometimes used the meter-cock, and sometimes the service-cock; that it was safer to cut off the gas by the service-cock under the curb-stone, than by the meter-cock in the cellar, for the reason that the service-cock, was under the exclusive control of defendant. The witness examined the meter-cock in plaintiff's cellar, soon after the explosion, and it had evidently been tampered with by somebody; found a nail in the hole of the meter-cock, which witness supposed had been used to turn it, though the gas was turned off when he examined it; knows that the gas must have got into the building in that way, that is, by some unauthorized person's turning the meter-cock in the cellar. The injury to the plaintiff's house by the explosion of gas therein resulted from the escape of gas from the meter-cock in the plaintiff's cellar, or from the gas fixtures in the house connected therewith.

It is insisted by the defendant in error that the explosion was caused by the careless negligence of the plaintiff or his tenants. The reply is that if the defendant had shut off the gas at the service-cock, instead of at the meter-cock in the plaintiff's cellar, on the 28th of December, 1873, when it was notified that the plaintiff had no further use for its gas on his premises, the explosion would not have occurred in that house on the 5th of January, 1874, for the simple reason that there would not have been any of the defendant's gas on the plaintiff's premises to explode either by the negligence of the plaintiff or his tenants. The plaintiff had no reason to suppose that any of the defendant's gas was on his premises, after it was notified to cut it off on the 28th of December, 1873,

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and therefore was not bound to take any precautionary action in relation to the escape of it, either by himself or tenants. The principle applicable to the defendant is this, that in the conduct of its business as a gas producer and furnisher thereof to its customers, it is bound to use such ordinary skill and diligence as is proportioned to the delicacy, difficulty and nature of that particular business. The evidence in the record before us is, that the gas was cut off at the meter-cock in the plaintiff's cellar, instead of at the service-cock under the curb-stone; that it was safer to cut off the gas at the service-cock than at the meter-cock; that if the gas had been cut off at the service-cock on the 28th of December, 1873, the explosion on the 5th of January, 1874, in the plaintiff's house, could not have occurred.

In our judgment there was sufficient evidence to have been submitted to the jury for them to say whether the explosion of the gas in the house was caused by the defendant's negligence or not, and that the granting of the non-suit was error.

2. In *Biggers vs. Pace*, 5 *Georgia Reports*, 171, it was held that a motion for non-suit should be overruled, where the jury might have inferred facts from the evidence which would support the plaintiff's action. The question of negligence or no negligence on the part of the defendant, was a question for the jury, and that question should have been submitted to them under the evidence contained in the record.

Let the judgment of the court below be reversed.

**JOHN W. HILL, plaintiff in error, *vs.* JOHN C. REEVES,
defendant in error.**

Except in cases of special liens for rent, on crops made on the land rented, a landlord may distrain for rent without a previous demand and refusal to pay, and without the allegation thereof in his affidavit.

Hines et al. vs. Munnerlyn et al.

Liens. Landlord and tenant. Distress warrant. Before Judge KNIGHT. Cobb Superior Court. November Term, 1875.

Reported in the opinion.

GEORGE N. LESTER; GARTRELL & DUNWOODY, for plaintiff in error.

W. T. & W. J. WINN, for defendant.

JACKSON, Judge.

Hill sued out a distress warrant, founded on no special lien, as landlord, upon the crop of defendant, but merely to enforce a general lien, to date from when the levy was made and entered, under section 4082 of the Code. The court dismissed the warrant because no demand or refusal to pay was made and avowed in the affidavit. None was necessary to enforce a general lien, as we decided in *Buffington vs. Hilly*, 55 Georgia Reports, 655. That case controls this.

Judgment reversed.

RICHARD K. HINES et al., plaintiffs in error, vs. CHARLES J. MUNNERLYN et al., defendants in error.

1. Where a tenant in common has mortgaged the entire estate, and such mortgage has been foreclosed, a court of equity has jurisdiction to enjoin levy and sale until after partition, especially where the mortgagor is insolvent.
2. A claim against the co-tenant for profits arising from the exclusive use of the estate will form a part of the decree for partition and account, and will take precedence of the mortgage made by him.

Equity. Injunction. Partition. Tenants in common. Mortgages. Liens. Before Judge WRIGHT. Decatur Superior Court. May Term, 1876.

Hines et al. vs. Munnerlyn et al.

Reported in the decision.

J. C. RUTHERFORD; W. O. FLEMING, for plaintiffs in error.

R. F. LYON; D. A. RUSSELL; O. G. GURLEY, for defendants.

WARNER, Chief Justice.

The complainants filed their bill against the defendants praying for a partition of certain described property therein mentioned, between them and the defendant, Munnerlyn, as tenants in common, and to enjoin the defendant, Arnett, from selling any part of said property, as mortgagee of Munnerlyn, by virtue of a *fi. fa.* issued on the foreclosure of his mortgage. On the trial of the injunction bill, the jury, under the charge of the court, found the following verdict: "We, the jury, find and decree that the complainants are entitled to one-half interest in the real estate as owned by Mrs. Hannah Munnerlyn and C. J. Munnerlyn, at the time of Mrs. Hannah Munnerlyn's death, to-wit: the following lots and fractional lots of land: three hundred and forty-nine, three hundred and forty-eight, three hundred and fifty-two, three hundred and sixty-four, three hundred and sixty-three, three hundred and eighty-eight, three hundred and eighty-seven, three hundred and eighty-six and three hundred and eighty-five, in the twentieth district; also two hundred and fifty-eight, two hundred and fifty-seven, two hundred and fifty-six, two hundred and fifty-five, two hundred and fifty-nine, two hundred and sixty, and two hundred and sixty-one, in the twenty-first district; also that the complainants are entitled to all the rents, profits and issues received from the aforesaid interest, as managed by C. J. Munnerlyn, before the time of Mrs. Munnerlyn's death, to the date of the mortgage given to F. G. Arnett, with interest included, amounting to \$6,712 00. We further find and decree that one-half the land mentioned in the large mortgage, to-wit: lots and parts thereof, three hundred and forty-

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nine, three hundred and forty-eight, three hundred and fifty-two, three hundred and sixty-four, three hundred and sixty-three, three hundred and eighty-eight, three hundred and eighty-seven, three hundred and eighty-six and three hundred and eighty-five, in the twentieth district; also two hundred and fifty-eight, two hundred and fifty-nine, two hundred and fifty-six, two hundred and fifty-five, two hundred and fifty-nine, two hundred and sixty and two hundred and sixty-one, in the twenty-first district, and all the land mentioned in the small mortgage, to-wit: two hundred and sixty-two, two hundred and sixty-three and two hundred and sixty-four, in the twenty-first district, (except one hundred and sixty-seven acres of lot two hundred and sixty-four, relinquished by F. G. Arnett,) was conveyed to F. G. Arnett by mortgage, to satisfy a certain promissory note against Munnerlyn, principal of the above note, \$6,250 00, with interest added, amounts to \$9,910 31. We further find and decree that the mortgage held by F. G. Arnett, has precedence to the indebtedness of C. J. Munnerlyn to the complainants." The complainants made a motion for a new trial, on the several grounds set forth therein, which was overruled by the court, and the complainants excepted.

It appears from the evidence in the record that C. J. Munnerlyn, the father of the defendant in the bill, died intestate, leaving the defendant and his mother, Hannah Munnerlyn, his heirs-at-law; that they lived together and enjoyed the property left them by the intestate as tenants in common until the death of the said Hannah, who, by her last will and testament, devised and bequeathed her one-half interest in the property inherited from her deceased husband (the same being undivided,) to the complainants. The defendant, C. J. Munnerlyn, after his mother's death, mortgaged the entire interest in the several lots of land in controversy, to the defendant, Arnett, to secure the payment of \$6,250 00 which the said Munnerlyn was indebted to him.

1. One of the main questions in the case made on the argument here, was whether Arnett, the mortgagee, should be

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enjoined from proceeding to sell the mortgaged property until the complainants, as tenants in common with the mortgagor, could have their interest and share in the property mortgaged by their co-tenant, ascertained, set apart, and partitioned to them, as the same existed at the death of their grand-mother, without regard to the incumbrance of the mortgage so far as their rights and interest in the property are concerned. There can be no doubt that Munnerlyn, the co-tenant of the complainants, could not convey or mortgage the joint property, so far as to affect or prejudice their title to or interest in it, as tenants in common, notwithstanding he may have attempted to convey or mortgage the entire interest in the property. There can be just as little doubt that the complainants were entitled to have the property partitioned between them and their co-tenant, C. J. Munnerlyn, without regarding the mortgage executed by him to Arnett. In view of the facts of this case, a court of equity properly had jurisdiction of it for partition: Code, section 3183.

2. Another of the questions made here was whether the complainants, as tenants in common, were entitled to have a decree out of the *corpus* of the property, on a partition, for the exclusive use thereof by Munnerlyn, their co-tenant, since the death of their grand-mother. On the part of the defendants it was insisted that the exclusive use of the joint property by Munnerlyn, the co-tenant, only created a debt in favor of the complainants as against him, and that that debt created no lien upon the joint property, or upon Munnerlyn's half of it. Whilst it may be true that the complainants have not strictly a legal lien upon the *corpus* of the joint property, or upon their co-tenant half of it for what he may be indebted to them for the exclusive use of the joint property, still the complainants have a clear equitable right, on a bill filed for partition and account against their co-tenant, to have his share of the joint property charged with such indebtedness in the decree for partition, the more especially when their co-tenant is insolvent, as in this case: 1 Story's Equity Jurisprudence, sections 654, 655; Code, section 3185. Whether their co-tenant

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is justly indebted to the complainants, in view of their maintenance and education, etc., whilst he was in the exclusive possession and control of the joint property, and what amount, must necessarily depend upon the evidence. Inasmuch as Arnett is interested as mortgagee of Munnerlyn's interest in the property, after a just and equitable partition thereof, he may contest the indebtedness of Munnerlyn to the complainants, if Munnerlyn himself should fail to do so. Whilst it may be true, as a general rule, that the undivided interest of a tenant in common can be levied on and sold when there are no obstacles in the way, or incumbrances on the property, yet, when there are such obstacles in the way and incumbrances on the property as will prevent a sale of the property for a full price, and enable the purchaser thereof to obtain a good title, it is the better and safer practice to ascertain by a decree of the court what are the rights of the defendant to the property levied on before a sale thereof. The decree in this case should have made an equitable partition of the property between the tenants in common, either by the appointment of commissioners for that purpose, or otherwise, as prayed for in complainants' bill, and then left Arnett to proceed to collect his mortgage *fi. fa.* out of that portion of the joint property which may be decreed to Munnerlyn, the mortgagor.

Let the judgment of the court below be reversed.

E. W. HOLLAND, plaintiff in error, *vs.* LONG & BROTHER,
defendants, in error.

1. When a writing is obscure or ambiguous, by reason of an unfamiliar abbreviation, what it means is for the jury. And to arrive at the meaning, clear and intelligible expressions in the instrument may be compared with facts otherwise proved.
2. If a retired partner would protect himself against future contracts made with the firm by persons who dealt with it while he was a member, he must affect such persons with notice of his retirement.

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3. There may be facts on which to base a charge of the court, without any direct evidence on the point to which the charge relates. It is enough if there be *data* from which a legitimate process of reasoning can be carried on.
4. The evidence was not insufficient to warrant the verdict.

New trial. Evidence. Partnership. Notice. Charge of Court. Before Judge PEEPLES. Fulton Superior Court. October Term, 1875.

Long & Brother brought complaint against the Atlanta Furniture Manufacturing Company, a partnership alleged to be composed of J. M. Willis and E. W. Holland, on two drafts accepted by the firm. The case was dismissed as to Willis, by consent, he having been discharged in bankruptcy. Holland pleaded that he was not a partner.

On the trial plaintiffs introduced the following evidence:

The acceptances, which were in the usual form, signed by the "Atlanta Furniture M'f'g Company, per W. L. Gordon, business man'ger."

The testimony of plaintiffs, which was, in brief, as follows: They became acquainted with defendants by means of a letter written to them by the latter, asking for a price-list of their goods. Afterwards they filled orders for the company. The paper on which such letter and orders were written was headed: "Atlanta Furniture Manufactory; J. M. Willis and E. W. Holland, proprietors; J. N. Fain, business manager; H. Sells, superintendent of works; office and manufactory corner Harris and Butler Streets, Atlanta, Georgia." The letter referred to above was signed "Atlanta Furniture M'f'g Co., H. Sells, superintendent." The goods for which the drafts were drawn, were sent to defendants' firm in December, 1873, and January, 1874. Plaintiffs never had any notice of the withdrawal of Holland from the partnership.

A plea, which Holland had signed and sworn to, in a suit against the same company, in the justice court, in which it was designated as the "Atlanta Man. Furg'y. Co.; J. M. Willis & E. W. Holland." The plea stated that Holland had not been a member of said firm since September 30th, 1873.

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J. T. Pendleton, who testified that he had a conversation with Holland in the summer of 1874 in regard to some claims which he held against the Atlanta Furniture Manufacturing Company; that Holland stated that he had withdrawn from the company on September 30th, 1873, no one knowing he was a partner, and admitted that he signed and swore to the plea mentioned above.

Defendant's testimony was, in brief, as follows: He never was a partner in the "Atlanta Furniture Manufacturing Company," nor authorized his name to be used as such. Became interested with Willis at the factory under the following circumstances: One Dr. Sells, who was doing business at said factory, became involved in a difficulty about the payment of \$500 00. He had a large amount of unfinished goods on hand, and said if defendant and Willis would pay the \$500 00 for him, he would give them the use of the shop and tools to finish the work. Defendant needed some furniture; he advanced \$250 00 and Willis \$250 00, to complete the unfinished furniture; when that was done had nothing further to do with it. Sold out his interest in September, 1873; was to get \$250 00 worth of furniture; only received \$225 00. Did not give notice of the sale because he did not think it necessary. Did not know that he was a partner in the "Atlanta Furniture Manufactory" until he had sold his interest in the factory. Was in a hurry when he signed the plea; read it, but did not look at it carefully; supposed it referred to the said "Furniture Manufactory;" also thought the conversation with Pendleton referred thereto. The factory on Butler and Harris streets had no connection with the Atlanta Furniture Manufacturing Company, whose business was conducted on Whitehall Street. Knew nothing of the bill-heads referred to in the plaintiffs' testimony.

The jury found for the plaintiffs \$502 15, besides interest.

Defendant moved for a new trial on the following, among other grounds:

1st. Because the court admitted in evidence the plea signed by the defendant over his objections.

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2d. Because the court erred in charging substantially as follows: (a) If Holland was a partner in defendant's firm before the drafts sued on were made, so appeared to the world, and gave no notice of his withdrawal, he would still remain a partner as to creditors of the firm, until notice should be given of such withdrawal or of a dissolution of the partnership. (b) If he was not a member of the firm, but allowed his name to be held out to the world as such, with his knowledge or consent, he would still be liable for debts created on the faith thereof. (c) If there is an irreconcilable conflict in the testimony of witnesses who are equally credible, the relations of the witnesses to the case, their opportunities for knowledge and any inducements they may have to swear falsely may be taken into consideration.

3d. Because the verdict was contrary to the law and evidence.

The motion was overruled, and defendant excepted.

The case was tried before Judge Hopkins and motion for new trial heard by his successor, Judge Peeples.

CANDLER & THOMSON; McCAY & TRIPPE, for plaintiff in error.

MARSHALL J. CLARKE; JACKSON & LUMPKIN, for defendants.

BLECKLEY, Judge.

1. The plea admitted in evidence was ambiguous as to the name of the company sued in the justice's court; and that ambiguity was for the jury to deal with, in the light of all the evidence: Code, sections 2754, 3801. One fact calculated to throw light on the matter was, that the time stated in the plea when Mr. Holland ceased to be a partner, was precisely the time indicated in his conversation with Mr. Pendleton as that when he withdrew from the "Atlanta Furniture Manufacturing Company." According to Mr. Holland's own testimony, the plea and the conversation with Pendleton related

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to the same partnership. He says, however, that he thought he was referring to the "Atlanta Furniture Manufactory." The plea, on its face, does not give either of these names exactly ; and, perhaps, it will serve as well for the one as for the other. Besides, we do not think there is any clear evidence in the record that there ever was any *partnership* under the firm name of the "Atlanta Furniture Manufactory." That seems to have been the name of an establishment, a place for the transaction of business, and we rather think the circumstances indicate that Willis and Holland were held out as proprietors, and that, sometimes at least, those who acted for them in that establishment used, in business, the firm name of the "Atlanta Furniture Manufacturing Company." Whether this was an assumption of authority on the part of Willis or on the part of the employees of the establishment, is not clear. But suppose it was, and grant that Mr. Holland gave so little attention to the business that he did not know what was going on, yet if his copartner, or the agents of the partnership, adopted a name for the partnership, when it had no fixed name, and, in that name, conducted the operation of the firm, why would not Mr. Holland be bound ? If he did not take the trouble to agree with his copartner upon a name, nor guard against a name being introduced without his concurrence, must those who gave credit to the concern lose their money ? Of course, if Mr. Holland and Mr. Willis were not copartners at all, in the business conducted at the factory, there would be no power to bind him by any name without his actual consent to being held out as a partner. But if the partnership existed, Mr. Holland's intention that it should be carried on secretly, without his name appearing to the public, would not protect him, if Willis, or the employees of the partnership, held him out as a partner, and obtained credit for the concern on the faith of his connection with it. If he was in fact a partner, however limited his interest or temporary his object, he would be liable for the ordinary partnership debts contracted while he continued a partner, and until he protected himself by proper notice of dissolution.

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2. And as to notice being necessary to those with whom the firm had dealings while he was a member, there can be no doubt. The charge of the court, in view of the evidence on that subject, was correct.

3. Mr. Holland admitted that he had an interest with Willis in some of the operations of the Atlanta Furniture Manufactory, carried on prior to September 30th, 1873. Parts of his evidence tend to show that he did not consider his connection with Willis as amounting to a partnership in fact. Some of the evidence in the case showed that letter-heads were sent to the plaintiffs with his name and that of Willis upon them as proprietors of the Atlanta Furniture Manufactory. A letter written to the plaintiffs on the page following such a heading, was signed "Atlanta Furniture Manufacturing Company." Mr. Holland was thus held out as a partner, whether he was such, in fact, or not; and this was prior to the creation of the debts sued for. It was for the jury to say whether this holding out was with his knowledge or consent; and to do this they could look to all the facts and circumstances in the evidence. Mr. Holland testified that he did not know of it or consent to it; but that was but a part of the evidence. There were various facts and circumstances which the jury might have thought indicated the contrary. To justify a charge on a given subject, it is not necessary there should be direct evidence going to that point; it is enough if there be something from which a legitimate process of reasoning can be carried on in respect to it. We thus arrive at the conclusion that there was no error in that part of the charge which announced the legal effect of holding out Mr. Holland as a partner, with his knowledge and consent, even if he was not a partner. There is no complaint against it except that it was unwarranted by the evidence—that is, based on an assumed state of facts. We might add, that even if this part of the charge was objectionable, a new trial ought still to be refused, because the evidence puts the case on higher ground than this part of the charge contemplates. The weight of the evidence is, that, at one time, Holland and Willis were in fact partners.

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4. There was evidence enough, on the whole case, to uphold the finding of the jury. It was for them to weigh it, and we do not feel authorized to pronounce that they abused their functions.

Judgment affirmed.

**GREEN B. MAYO, plaintiff in error, *vs.* TILLMAN WALDEN,
defendant in error.**

1. If an attorney at law unfairly represents the testimony, and draws erroneous conclusions therefrom, the attention of the court should be called to such irregularity, and its judgment obtained thereon, otherwise this court has no jurisdiction to review such conduct.
2. The verdict is supported by the evidence.

New trial. Attorneys. Practice in the Superior Court. Before Judge CLARK. Lee Superior Court. March Term, 1876.

Reported in the decision.

LYON & NISBET, for plaintiff in error.

W. A. HAWKINS, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendant for an account and settlement. On the trial of the case, the jury found a verdict in favor of the complainant for the sum of \$900 00. The defendant made a motion for a new trial on the various grounds therein set forth, which was overruled by the court, and the defendant excepted.

1. In relation to the ground taken in the motion that the complainant's counsel unfairly represented the testimony, and drew erroneous conclusions therefrom in his argument of the case to the jury, we can only say that if the complainant's counsel was guilty of any improper conduct unbecoming an

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attorney and counselor at law, or solicitor, in the management or argument of the case in court, and especially as to the alleged irregularities complained of, it was the duty of the opposing counsel then and there to have called the attention of the court to such irregularity or improper conduct, and have obtained the judgment of the court thereon. Until the matter had been brought to the attention of the court below, and a judgment rendered thereon, there is nothing here for this court to review in connection with the alleged misconduct of the complainant's solicitor in the argument of the case. This court has no original jurisdiction to control the conduct of attorneys and solicitors in the argument of cases in the superior courts, or any other, except its own court.

2. In looking through the record in this case, we find no error in overruling the motion for a new trial. There is sufficient evidence in the record to support the verdict, and we will not disturb it. This case comes within the repeated rulings of this court in similar cases.

Let the judgment of the court below be affirmed. .

WILLIAM MARKHAM *et al.*, plaintiffs in error, vs. NEEDHAM L. ANGIER *et al.*, defendants in error.

Equity will relieve against a judgment which was obtained by inducing the defendants thereto to withdraw an equitable plea they had filed in the case, by a promise of the plaintiff that if such plea were withdrawn he would do the equity set up in the plea, and would enter into writing to that effect, all of which he failed to do; and this court will not control the discretion of the presiding judge in granting an injunction until the case can be fully heard on the merits, especially when the complainants' offer to do equity on their part by paying up their portion of the judgment, and when the injunction is granted on that condition.

Equity. Injunction. Before Judge PEEPLES. Fulton County. At Chambers. May 24th, 1876.

Reported in the opinion.

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Markham et al. vs. Angier et al.

McCAY & TRIPPE, for plaintiffs in error.

E. A. ANGIER, for defendants.

JACKSON, Judge.

This was a bill filed by Angier and others against Markham, for relief against a judgment which was being enforced against the property of complainants by Markham. The bill prayed for an injunction against the judgment; it was granted, and the grant of the injunction is the error assigned. The only reason alleged below or here, why the injunction should not be granted, is the want of equity in the bill, all the facts charged being admitted by demurrer thereto. The facts are, that complainants, together with Markham, were securities on the bond of Atkins, as revenue collector for the United States government. Atkins became a defaulter in consequence of some defalcation of his deputies, and borrowed from Markham some \$10,000 00 to pay the government, all the securities to his bond, including Markham, going security on the note. At its maturity the note was not paid, and another was given for \$11,000 00, the interest being added, with Markham's name off the second note. The bill is not satisfactory on the point why it was left off the second note, possibly because it looked odd for a man to be security for and to himself. Atkins gave a mortgage on considerable real estate to secure the securities on his bond, including Markham. At the maturity of the second note Markham sued it, and complainants filed an equitable plea, setting out the foregoing facts, and alleging that judgment should go against them for only their part of the note, leaving Markham to pay his share of Atkins' default, after the mortgage lands were exhausted, if they did not pay up everything. This equitable plea was withdrawn by them on the promise and assurance of Markham that he would enforce the judgment only for their parts or shares of the default after the land was exhausted, and agreeing to put this pledge in writing. All of which he failed to

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do, but has levied on the property of complainants to enforce the whole judgment. They offer to do equity and pay up their shares. The chancellor enjoined Markham from pressing his judgment, upon the complainants paying their shares as securities for Atkins, which is now ascertained, the mortgaged lands having been sold; complainants paid up their shares, and Markham stands enjoined until he answers the bill and the case is tried on its merits. This grant of the injunction is the error assigned.

We think that the chancellor has done exactly right. It appears to us, from the allegations in the bill, which the demur-
rer admits to be true, that a glaring fraud would be perpetrated by Markham upon his co-securities unless the chancellor had interposed. Courts of equity will grant relief against judgments at law. Indeed, our own Code explicitly grants them the power: Code, section 3178. This court has held in a case very similar to this, that equity ought to relieve in such a case. In *Hemphill and others vs. The Ruckersville Bank*, 3 Georgia Reports, 435, judgment had been obtained on the assurance to complainants that if they would withdraw their appeal and confess a judgment, the plaintiff in judgment would stay proceedings till 1844, and then settle fairly with complainants, carrying out the agreement and doing the promised equity; and that was held, when he falsified his word and failed to keep his promise, to be a strong case for equity to interfere. (See Judge WARNER's opinion, page 442.) In 7 Georgia Reports, 404, when the same case was up again, Judge LUMPKIN re-affirms the principle then decided. If a promise, in consideration that an appeal will be withdrawn and judgment allowed to go, or be confessed, will be enforced in a court of equity, against the judgment obtained on the strength of that promise, it is difficult to see why a promise, based on the withdrawal of an equitable plea, will not be in like manner enforced against a judgment obtained by its withdrawal. Indeed, in this case, the plaintiff saved \$300 00 in lawyers' fees; he has pocketed every cent that these complainants justly owe him in addition, and now seeks to make them pay him

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also his part of the loss occasioned by the joint suretyship for Atkins. In *Wimberly vs. Adams*, 51 *Georgia Reports*, 423, the same principle is ruled, only in that case an affidavit of illegality, under the peculiar facts there, is held a good and sufficient remedy. What law or equity, or good sense, there can be in permitting the consummation of such a fraud passes our comprehension. It has been held by this court that facts developed after an agreement of this sort may well be invoked to show that it was the purpose of the party to defraud at the time he made the contract: 17 *Georgia Reports*, 515.

Indeed, there is no way of arriving at intention except by outward acts, and the failure to do what one promises to do; if he has ample power to do it, it is generally the very best evidence that he did not intend to comply with his promise, but the fraud was in his heart when he made it. Relief has been granted, even against an administrator who was enforcing judgments against the heirs, where they held equitable sets-off in the shape of distributive shares, and even when the administrator was not insolvent. The policy of the law is not to interfere with the regular course of administration; yet, a court of equity sees the folly of drawing money out of a man at expense and paying it right back to him again; and when the administrator does not need it for paying debts, the relief is granted against a judgment even in his hands: See 20 *Georgia Reports*, 96; 36 *Ibid.*, 666; 49 *Ibid.*, 245. Now what is the case at bar, at last, but the prayer on the part of complainants to plead an equitable set-off against this judgment. According to the bill, Markham owes the complainants contribution to the full amount left due on the judgment, and if they are forced to pay him the judgment, he can be forced to pay it back immediately on the principle of contribution to them. The court of equity having got jurisdiction, will do full justice, and retain it until that justice is done. Where there is concurrent jurisdiction as in fraud, the court first getting it will keep it. This is a case of fraud, if there ever was one: 53 *Georgia Reports*, 37.

Again, the jurisdiction is good here to avoid a multiplicity

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of suits. If each of these complainants must sue Markham for contribution, or if each must file an affidavit of illegality, suits will be multiplied and equity will prevent that. It is doubtful if illegality would lie at all, because the inception of this fraud was prior to the judgment, and illegality will not go behind it: Code, section 3671.

Again, this is a contract executed on the one side by the withdrawal of the plea; and the advantage of getting his judgment and the money thereon and saving counsel fees, has already accrued to the plaintiff in *f. fa.*, and equity will make him specifically perform his agreement, and this gives to equity jurisdiction of the suit; and this, too, avoids all trouble about the statute of frauds, even if Markham had not agreed to put his promise in writing and failed to do so: 17 *Georgia Reports*, 515. So that equity has jurisdiction here, first to relieve against a judgment unconscientiously obtained; second, because of fraud; third, to avoid a multiplicity of suits; fourth, to bring in equitable sets-off; and fifth, to force the specific performance of an agreement executed on one side and defied on the other. Perhaps there may be other grounds for the interposition of chancery in this case, so bristling with defiance of right, but we think the above will do.

Judgment affirmed.

NELSON TIFT, administrator, plaintiff in error, *vs.* CHARLES P. HARTWELL, executor, defendant in error.

(BLECKLEY, Judge, was providentially prevented from presiding in this case.)

The litigation in this case, arising upon a bill in equity to enjoin a common law suit, and cross-bill thereto, etc., carried within it but two questions, to-wit: 1st. Whether a certain legacy to the maker of a note could be set-off against his liability thereon. 2d. To whom did the title to a certain lot of land belong? The jury returned the following verdict: "We, the jury, decree as follows: 1st. That the balance due on note against the estate of T. M. Nelson, and the legacy in favor of T. M. Nelson, be both canceled. 2d. That the title to lot in dispute be vested in the estate of T. M. Nelson;"

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Held, that this verdict was sufficiently certain to warrant the founding of a decree thereon.

Verdict. Decree. Before Judge WRIGHT. Dougherty Superior Court. April Term, 1876.

Hartwell, as executor of James C. Solomon, deceased, brought suit against Tift, administrator of T. M. Nelson, deceased, on a promissory note made by Nelson to R. F. Lyon, or bearer. The amount of the note was \$800 00; but on it was indorsed a credit of \$500 00.

Tift filed his bill, in which he alleged that Solomon had left to Nelson a legacy of \$500 00; that the executor, Hartwell, refused to give his assent thereto, although the estate was free from debt, and there were assets remaining. The prayer was that the aforesaid suit be enjoined, and Hartwell be compelled to pay the balance of the legacy after deducting what should be shown to be due to his testator.

Respondent filed his answer in the nature of a cross-bill. He admitted the legacy as charged in the bill and his refusal to assent thereto. He further alleged that the estate of his testator consisted largely of slaves; that during the war this legacy could have been paid; but that Nelson having died, and there being at that time no representation on his estate, no settlement was had; that since the war nothing was left in his hands, as executor, except certain ante-bellum debts (which he believed to be valueless) and the title to a lot in the city of Columbus; that this lot was bought by his testator from Nelson, and paid for; that the latter referred him to R. F. Lyon for titles; that said Lyon refused to make titles until the purchase money should be paid, for which he held Nelson's note for \$800 00; that this was paid by respondent's testator, and titles taken; that he went into possession of such lot, and so continued until his death, and afterwards it passed to respondent, as executor, and he still pays tax thereon: that some two years since, plaintiff took possession of said lot, claiming it as part of the estate of Nelson, and is still holding it and receiving profits therefrom; that such claim has injured his in-

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testate's estate and imperiled its solvency. The prayer is that plaintiff may be compelled to pay the balance due on the promissory note, and reasonable rents for the property, and that the legacy may be scaled so as to arrive at its value in present currency, the intention of testator having been to give it in Confederate money; and, finally, that plaintiff be enjoined from setting up title to the aforesaid lot.

To this cross-bill plaintiff answered, denying that the title to said lot ever passed out of his intestate, and averring that the note on which suit was brought was purchased by Solomon from Lyon, the former being in the discounting business; and that the deed made by said Lyon was merely an escrow to secure the payment of the money for which such note was given.

The other material facts are contained in the decision.

S. HALL; WARREN & HOBBS, for plaintiff in error.

D. A. VASON, for defendant.

WARNER, Chief Justice.

This case came before the court below for trial on an original bill filed on the equity side of the court, and cross-bill, embracing several matters in controversy between the parties. There was a good deal of evidence introduced on both sides. The jury returned the following verdict: "We, the jury, decree as follows: First, that the balance due on the note against the estate of T. M. Nelson, and the legacy in favor of T. M. Nelson, be both canceled. Second, that the title to the lot in dispute be vested in the estate of T. M. Nelson." Upon this verdict the complainant's solicitor presented a decree to the chancellor for his signature, which he refused to sign on the ground, as stated in the bill of exceptions, that the verdict was void for want of certainty. Whereupon the complainant excepted.

If the verdict was void for uncertainty, then it should have been set aside, but in our judgment, the verdict was not void

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for uncertainty; its terms are quite plain and easily understood, and the chancellor should have signed a decree thereon as required by the 4212th section of the Code, and it was error in refusing to do so.

Let the judgment of the court below be reversed

**JAMES L. WATKINS, plaintiff in error, *vs.* JOHN S. PAYNE,
defendant in error.**

1. The successor of the judge who presided at the trial may authenticate to this court the grounds taken before himself in motion for a new trial.
2. A press letter book is not original but secondary evidence of the contents of the letters.
3. If the charge, as a whole, is not inapplicable, the inapplicability of some parts of it will not avail on a general objection to it as a whole.
4. When it is desired that the charge should be more definite and specific as to a certain branch of the case, attention should be called thereto by a proper request.
5. Delivery to a carrier according to the usage of trade, will be delivery to a purchaser of goods who orders them to be shipped, but specifies no particular carrier or class of carriers, and after notice of shipment, makes no objection to the carrier selected.
6. After a purchaser has retained the goods for nearly two months, without giving notice of his rejection of them as not coming up to the description embraced in his order, his appropriation of a part by a sale thereof will be an appropriation of the whole, so far as to subject him to pay for them at their real value, not exceeding the contract price.
7. Letters which might have been put in evidence at the trial, but were not, will not be considered on a motion for new trial.
8. When material facts were known to the party at the trial, and he was a competent witness to prove them, but made no allusion to them in his testimony, and when he might, also, by the use of due diligence, have discovered another witness who knew the same facts, the discovery of this other witness, after the trial, will be no cause for a new trial.
9. The verdict was not contrary to evidence.

New trial. Evidence. Charge of Court. Practice in the Superior Court. Carriers. Delivery. Sales. Before Judge PEEPLES. Fulton Superior Court. October Term, 1875.

Reported in the opinion.

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ARNOLD & ARNOLD; ROBERT BAUGH, for plaintiff in error.

COLLIER & COLLIER, for defendant.

BLECKLEY, Judge.

1. Objection was made in this court to considering some of the grounds of the motion for new trial, because Judge Hopkins presided at the trial of the case, and the motion for new trial was made before his successor, Judge Peeples, who probably had no personal knowledge of what transpired at the trial. The bill of exceptions, certified by Judge Peeples, states that the court charged and refused to charge as set forth in the motion. When the motion for a new trial is not made before the judge who presided at the trial, but before his successor, and the new trial is refused, and thereupon the refusal is complained of as error, the grounds of the motion, as to matters of fact, are well authenticated by a distinct affirmation of their truth in the bill of exceptions. The judge who hears the motion and certifies the bill of exceptions, is competent, in law, to ascertain and decide upon the truth of the grounds, and his certificate is conclusive.

2. The defendant's "original letter-press copy book," was rejected as evidence of the contents of letters which he had written to the plaintiff. The letters, themselves, were the primary evidence, and nothing was done to procure them, or account for their non-production.

3. One of the grounds of the motion for new trial is, that the charge of the court, as a whole, was inapplicable to the case. We do not think it was; and this sweeping objection will not bring under review the applicability of separate parts of the charge.

4. Another complaint is, that the court should have explained to the jury the effect of a delivery to the carrier in Boston, if the contract was for delivery in Atlanta. The decided weight of the evidence was that the goods were to be

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shipped from Boston with no undertaking to deliver elsewhere. The only evidence which could be construed as hinting a contract to deliver in Atlanta, is the statement in the defendant's testimony that they were to be forwarded so as to reach Atlanta by the first of January. And such a construction would be a forced one. This testimony goes to expedition, and not to place of delivery. But, in any view of the matter, as the court had made a charge applicable to the main drift and current of the evidence, the defendant should have called attention to the omission to notice a cross-current so very feeble. There was no request to extend or amplify the charge, or to give any specific proposition.

5. The action is for the price of the goods, or their value. By letter written at Atlanta on December 26th, addressed to the plaintiff at Boston, the defendant ordered the plaintiff to ship at once "at the low rates." The plaintiff shipped by steamer, via Charleston, on December 31st. So far as appears, no objection was ever made by the defendant to the conveyance selected, or to the rates of freight. This being so, it was not error to charge the jury that "if defendant directed plaintiff to ship the goods to him from Boston to Atlanta, and plaintiff delivered them for defendant to the carrier by which such shipments were usually made in that trade, it would be a delivery to defendant, if the kind and quality of goods ordered were shipped, and it was within the time contemplated by the order. If not within that time, or if they were not such as were ordered, such a delivery to the carrier would not be a delivery to the defendant, and he would have the right, when received by him, to reject or accept them as he saw proper."

6. The whole purchase amounted to a little less than \$500. The items of the bill consisted of furniture, two sets priced separately, and various articles, such as bureaus, desks, etc., at so much each, all embraced in the same order and shipment. The defendant received the goods on January 15th, and, so far as appeared in evidence to the jury, made no objection to them until March 10th. In the meantime, or after-

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wards, he sold \$134 50 worth of them; and the rest were destroyed in his store by fire on April 3d. His complaint was: first, that the goods, by the contract, were to have arrived in Atlanta by the first of January; secondly, that some of the ornaments embraced in the same order and essential to the finish of certain of the articles never did arrive; and thirdly, that many of the goods were not of the quality ordered, but inferior and of less value. The plaintiff's evidence went to show that the goods sent were precisely those ordered, and of the value charged in the bill. The defendant testified that they were not of the quality ordered, and that their value was less by so much. As to the time of arrival, plaintiff's evidence set up a contract without any stipulation touching the time of arrival, but for shipment within a reasonable time, and without needless delay. The defendant testified that the goods were to be forwarded so as to reach Atlanta by the first of January; but he wrote a letter from Atlanta to the plaintiff at Boston, on the 26th of December, directing him to ship at once, and the plaintiff did ship on the 31st of the same month. The original order was given in Atlanta, verbally, to the plaintiff's agent, on the 16th of December. Under this state of facts, it was not error for the court to add to the foregoing charge, these further instructions: "That if the goods were not such as were ordered, the defendant might appropriate them, and he would be liable for their reasonable value. If the purchase was an entire transaction, and there was an appropriation of a part of the goods, it would be an appropriation of the whole." To retain the whole for nearly two months, without complaint, might well be considered an appropriation of the whole, though there had been no sale by the defendant of any part, but both circumstances put together would undoubtedly justify this part of the charge. After keeping the goods such a length of time, it would be too late to treat the purchase as still executory. Any subsequent offer to restore them could only be in the nature of a proposition to rescind, and to reach rescission the seller would have to be reinstated in his ownership of all the property em-

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braced in the same order. If the defendant sold a part thereof, which seems to have been the case, he put rescission out of his power. The court did not charge that appropriation would make the defendant liable for the contract price but for reasonable value.

7. In the motion for new trial, the defendant seeks to avail himself of certain letters that passed between the parties, of which he gave no evidence to the jury. These letters cannot be considered, for the reason that their contents were not used on the trial, and no sufficient excuse appears for leaving them out of the case. They were as well known to the defendant then as now.

8. The alleged newly discovered evidence of the defendant's father is no ground for new trial. The facts were known to the defendant himself at the trial; he was competent to testify to them, and although examined as a witness, he said nothing about them. That his father also knew the facts, might have been ascertained by the use of due diligence. Such diligence is not shown. There was inquiry made of the father as to his knowledge of the original contract, but none as to his knowledge of the modification, which is the matter sought to be brought in as newly discovered. The father was agent and salesman in the defendant's establishment, and that situation pointed him out as one likely to be well informed touching the current business. But the insuperable difficulty is, that the defendant, himself, knew the facts, and voluntarily left them out of his testimony.

Judgment affirmed.

HENRY A. TARVER *et al.*, plaintiffs in error, vs. WILLIAM H. ELLISON, defendant in error.

(BLECKLEY, Judge, having been of counsel in this case, did not preside.)

1. The sale of land by virtue of execution issued on a judgment junior to a mortgage, not foreclosed, conveys to the purchaser only the property sold,

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which, in this state, the equity of redemption, or its equivalent, which is the estate in the land subject to the mortgage debt, and such sale divests the lien of a judgment older than the mortgage, only upon that interest or estate in the land which is sold.

2. If there be not money enough raised from the sale of this equity of redemption, or interest in the land subject to the mortgage, to pay off the judgment which is older than the mortgage, an execution issued upon such older judgment may be levied upon the residue of the estate in the land, and being older than the mortgage, it will sell the land free from its incumbrance, and the title of the purchaser will be good against the mortgage.

Levy and sale. Mortgage. Liens. Before Judge WRIGHT. Calhoun Superior Court. March Term, 1876.

Reported in the opinion.

VASON & DAVIS ; R. F. LYON ; R. N. ELY, for plaintiffs in error.

C. B. WOOTEN ; LANIER & ANDERSON ; J. L. BROWN ; B. B. BOWER, for defendant.

JACKSON, Judge.

Ellison foreclosed a mortgage on certain lands in Calhoun county, and levied the mortgage *fi. fa.* upon them ; a claim was interposed by Tarver, and Colquitt was made a party claimant also, Tarver having bought the land for him. The facts were submitted to the presiding judge without the intervention of a jury, for his decision, subject to be reviewed here. The court below held that the land was subject to the mortgage *fi. fa.*, the claimant excepted, and the question is, was it subject under the facts agreed upon.

Those facts, in substance, are as follows : Before the foreclosure of the mortgage the land was levied on by the United States marshal on a *fi. fa.* from the United States court, issued upon a judgment younger than the mortgage, and Tarver bought for Colquitt. Afterwards, an older *fi. fa.* issued from an older judgment than the mortgage, from the state courts, was levied upon the same land, and Colquitt bought, so that

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Colquitt's title rest upon two purchases, one on a sale by virtue of a judgment younger than the mortgage, and the other by virtue of a sale on a judgment older than the mortgage.

1. It is clear that the first purchase will not protect his title from the mortgage, because the mortgage having been recorded, he bought with notice and it is older than the judgment which sold the land. The question then is narrowed to this, will his last purchase protect his title from the mortgage? Undoubtedly it will protect him, inasmuch as the judgment under which the land was then sold is older, and its lien superior to the mortgage, unless that lien was extinguished as to the entire estate in the land by the first sale. Was the lien extinguished by that first sale to the whole estate? Unquestionably it was extinguished to the extent that the land was sold. The rule is that the older judgment creditor must look to the fund arising from the sale, and not to the land—his lien is transferred from the land to the fund, and if there be enough money to pay him and he neglects to go and get it applied by rule to his *fi. fa.*, no matter what estate in the land is sold, his lien being taken off the land and put on the fund, is gone, because his *laches* alone prevented him from getting his money.

2. But if, as in this case, the fund is not enough to pay him, and the fund does not represent the whole land, the entire estate in it, but it is sold subject to a mortgage, and thus represents only the value of the land, less the mortgage debt, it is clear that the reason of the rule, that his lien is transferred to the fund and taken off the land, has ceased; because only a part of the land is in the fund, whereas his judgment lien, being older than the mortgage debt, covered all the land that was represented by the mortgage estate, as well as that represented by what the law calls the equity of redemption. In other words, that which was sold at the first sale for \$775 00 was what Colquitt bought by Tarver, which was all the estate except the part left in the mortgagor for the mortgagee to pay his debt, and that which Colquitt bought at the last sale, for \$1,000 00, was the residue of the estate left in the mortgagor

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to pay the mortgagee, and as the lien of the judgment, older than the mortgagee, was never extinguished as to that estate, there being no fund in court raised by the first sale to represent that upon which the lien of the older judgment could attach, it seems plain that the title to the whole land, free from the mortgagee, is in the claimant.

Suppose that this mortgage had been foreclosed, and the whole estate in these lands had been sold at the first sale, and the fund had been in court for distribution, it is clear that the older judgment would take the whole fund over the mortgage *fi. fa.*, because there was not enough at both sales to pay it off. Absolutely nothing would have been then left for the mortgagee. Is it the law that by failing to foreclose he can get more of the land than by foreclosure? We think not. In either case his rights are superior to the junior judgment, and inferior to the senior judgment. If land be sold under a judgment junior to his lien, the purchaser buys subject to it; if land be sold under a judgment older than his lien, the purchaser buy free from it. The older judgment creditor, after he has applied the fund in court, raised by the sale of the estate, less the mortgage, has the right to sell the residue of the estate left in the mortgagor, and a purchaser of such residue, if he be also the purchaser of the part sold at the first sale, takes, we think, complete title.

It cannot be doubted that the naked sale of property unencumbered by special liens, such as mortgages, sold under junior judgment liens, divests senior judgment liens. It was so held in 9 *Georgia Reports*, 164, because it had been the Georgia practice in our circuit courts, Judge NISBET, in delivering the opinion, saying, however, that it could not stand upon principle, but the courts followed the practice on the circuits. In 10 *Georgia Reports*, 148, it was reaffirmed, but it rests on the idea that the lien attaches to the money which is in place of the property, and in lieu of all of it, and supposes all to be sold. But in the case at bar *all* was not sold, but only a part, to-wit: the land, less "the value of the mortgage lien, or the equity of redemption." This court has de-

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cided that in such cases, only part of the estate, to-wit: the equity of redemption, is sold. In 7 *Georgia Reports*, 187, Judge WARNER says: "The general rule in this state undoubtedly is that when mortgaged property is levied on by execution, issuing upon a general judgment against the mortgagor, and sold subject to the incumbrance of the mortgage, that the purchaser gets *only* the mortgagor's equity of redemption," etc. In 20 *Georgia Reports*, 728, Judge LUMPKIN rather ridicules the idea that in Georgia no such thing as the equity of redemption exists and can be sold; and goes on to say: "Harwell & Callaway have mortgage liens on the negroes of Lee; common law judgments are obtained against Lee, of a junior date; the property is levied on and sold. How? Subject, of course, to the senior mortgage incumbrance; and denominate the interest or thing sold, the equity of redemption, or by any other name, the legal effects and results are precisely the same." Afterwards, he adds: "In this case the negroes being sold subject to the mortgages, we are bound to presume that the price at which they were knocked off, was their value only over and above the sum for which they were mortgaged." So in the case at bar, we are bound to presume that what this land, at the first sale, brought, was only its value over and above the mortgage, and only that was sold, and the residue remained in the mortgagor to be sold again, either by the mortgage when foreclosed or a lien to which the mortgage was inferior. So in 11 *Georgia Reports*, 637, it was ruled that if an older judgment lets a junior judgment take money raised from the sale of defendant's property, it is extinguished *only pro tanto*, as to third persons; as much as to say it is not extinguished, if there be any other property on which it can go, and it would not have been paid off entirely had it got the money. So, also, the Code, section 3659, provides. So Judge McDONALD, in 25 *Georgia Reports*, 329, expressly rules that one who buys subject to a mortgage, buys only the equity of redemption.

We hold on authority therefore, as well as principle, that the first purchaser here bought the equity of redemption, which

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was part only of this estate; that there remained another estate in this land which was subject to the mortgage and to liens older than the mortgage; that this last estate was sold under the older lien, superior to the mortgage; that the claimant holds both titles, and that the land is his. It is true that in England, and wherever the common law remains unaffected by statute, the mortgagee takes title to the land subject to the right of the mortgagor to redeem, and this right to redeem, to buy it back, is the equity of redemption, and as, in this state, no title passes to the mortgagee, there is no need to redeem, to buy back, what never passes out of the mortgagor, the mortgage being only a security for debt in the shape of a lien upon the property, and therefore, technically, there may be no such thing as the equity of redemption. But practically and equitably, so far as principle applied to the facts at bar is concerned, it is the same thing. The mortgagor holds the whole estate, the entire interest in the land, but carved, as it were, into two parts in respect to the rights of judgment creditors; as to junior judgments to the mortgage, an estate less the mortgage, and as to senior judgments, an estate embracing the value of the mortgage. Only a part analogous to the equity of redemption was first sold by the junior *f. fa.*, and Tarver bought that; and as to that part the senior judgment lost its lien; it left the land and attached to the money which that part of the estate in the land brought; but as to that estate or interest in the land which was never sold, there was no money representing it on which the lien could be transferred; therefore it remained a lien on the land, and by virtue of that lien this judgment, older than the mortgage, sold the interest of the mortgagee in the land, and Colquitt bought it, and the title is in him free from the incumbrance of the mortgage. Mark, there was not money enough raised from the first sale, which may be called the equity of redemption, to pay off the older judgment, if all had been applied to it. If there had been money enough to pay it off it would have been extinguished, whether actually applied to it or not. The question is a new one, but we think we have applied the correct legal

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and equitable principles to its solution, and that all the Georgia authorities are reconcilable to their application.

Judgment reversed.

**WILLIAM HARRISON *et al.*, executors, plaintiffs in error, vs.
JAMES RUTHERFORD, defendant in error.**

Two judgments were rendered in the inferior court of Quitman county at the February term, 1865, in favor of Crawford against Rutherford. More than ten years afterwards (the inferior court having in the meantime been abolished) certain parties filed their petition in the superior court of said county, alleging that they were the executors of one Harrison to whom Crawford had assigned the above claims for a valuable consideration, that the minutes of the inferior court failed to show that any jury had been legally impaneled when the verdicts were rendered, and praying that the judgments founded thereon be declared void, and the cases entered on the docket of the superior court in the name of Crawford for the use of petitioners. No reason was assigned for the delay in making such petition: *Held*, that the want of diligence on the part of plaintiffs, and the lapse of time, unexplained, constituted an equitable bar to the reinstatement of the cases.

Inferior Court. Judgments. Practice in the Superior Court. Statute of limitations. Before Judge KIDDOW. Quitman Superior Court. May Term, 1876.

Reported in the decision.

JOHN T. CLARKE, for plaintiffs in error.

A. HOOD; B. S. WORRILL, for defendant.

WARNER, Chief Justice.

This case came before the court below on two petitions of the plaintiff to have certain verdicts and judgments therein described set aside and vacated, and the cases reinstated on the docket of the superior court of Quitman county. As the same question was involved in both cases, they were ar-

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gued together by consent. The statement of the facts in one case is all that is necessary to a clear understanding of the question presented for decision in both. The plaintiffs allege, in one of their petitions, that on the 20th of January, 1863, Crawford instituted his action of complaint against Rutherford, in the inferior court of said county, returnable to the February term, 1863, of said court, on a promissory note, in which suit, at the February term, 1865, of said court, a verdict for plaintiff was entered on the minutes of said court, and a judgment entered thereon against said defendant for \$997 57, with interest and costs; that afterwards, Crawford, for a valuable consideration, transferred to the plaintiffs the claim, suit and judgment, which claim still remains due to petitioners; that as it appears from the minutes of said court that there was no legally impaneled jury attending said court to render said verdict, said verdict and judgment are void *ab initio*. Wherefore petitioners prayed that said verdict and judgment might be declared vacated, and that said case might be reinstated on the docket of cases pending and undetermined in the superior court, and that the same proceed to trial in the name of said Crawford for the use of petitioners. The defendant demurred to the petitioners' application, the court sustained the demurrer, and dismissed it on the ground that the motion was barred by lapse of time. Whereupon the plaintiffs excepted.

The theory of the plaintiffs is that the cases were pending on the docket of the inferior court, and were, by operation of law, transferred to the county court, and from the latter court to the superior court, and that according to the decision of this court in *Rutherford vs. Crawford*, 53 *Georgia Reports*, 138, there never has been any legal verdict or judgment rendered in said cases, although the same were stricken from the docket of said courts, and, therefore, in contemplation of law, said cases have been legally pending in said courts, and should now be entered on the docket of Quitman superior court, and stand for trial as they would have done if the same had not been stricken from the docket of said court. Assuming that

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said cases were originally legally entered on the docket of the inferior court, and have never been legally disposed of, so as to have authorized the inferior court to have stricken them, from its docket, still, they were stricken, and the question is whether the court below erred in refusing the motion to reinstate the cases, on the statement of facts contained in the record. The cases were stricken from the docket of the court most unquestionably when the pretended verdicts and judgments were obtained therein in February, 1865. More than ten years had elapsed from the time the cases were stricken from the docket up to the time of making the present motion to reinstate them. If the plaintiff in the suits had exercised ordinary diligence he would have known that his cases were stricken from the docket, and there is no pretense that he did not know it. The plaintiff was bound to exercise reasonable diligence in the prosecution of his legal rights, and not wait until the loss of papers, or the death of witnesses, would render it difficult to establish the rights of the respective parties in the suits sought to be reinstated: *Bostwick vs. Perkins, Hopkins & White*, 4 Georgia Reports, 43.

In this state, courts of law have concurrent jurisdiction with courts of equity to refuse to relieve a party by granting him a motion to reinstate his case upon the docket when from lapse of time it would be inequitable to do so. The cases were not stricken off the docket of the court by any motion or act of the defendant therein. In our judgment, not only the want of diligence on the part of the plaintiff, but the lapse of time, if not strictly a legal bar, would constitute an equitable bar to the plaintiffs' motion in this case, even if the present plaintiffs could, by a transfer of the original plaintiff, acquire a right to reinstate the cases and prosecute the suits against the defendant.

There was no error in refusing the motion to reinstate the case on the docket as prayed for in the plaintiffs' petitions on the statement of facts contained in the record.

Let the judgment of the court below be affirmed.

Killen *vs.* Compton *et al.*

T. N. KILLEN, plaintiff in error, *vs.* P. M. COMPTON *et al.*, defendants in error.

A motion by defendant to dismiss the action because the matter of the declaration has been adjudicated in a former suit between the same parties, is not available unless the former adjudication appears on the face of the declaration. A defense which is appropriate alone to a plea cannot be presented by a mere motion.

Pleadings. Former recovery. Practice in the Superior Court. Before Judge KIDDOO. Terrell Superior Court. May Term, 1876.

A report of this case is unnecessary.

IRVIN & GRESHAM, for plaintiffs in error.

PARKS & PARKS, by brief, for defendant.

BLECKLEY, Judge.

We have never read or heard of a motion like this. Former recovery is matter for plea in bar, or, under the Code, in abatement: Code, section 3476. Doubtless, if it appeared on the face of the declaration, it might be taken by demurrer, or, since the Code, by motion: section 3459. But here there is no trace of it in the plaintiff's pleadings. It is brought forward by the defendant; and he presents it, not by plea of any kind, but by way of written motion to dismiss the action at the appearance term. His counsel cites as authority *Kimbro & Morgan vs. Virginia and Tennessee Air Line Railway*, 56 *Georgia Reports*, 185, but certainly that case gives no hint that the vehicle of defense may be motion, or anything but plea.

We have no occasion now to rule whether, in ejectment, dismissal of a first action, by the court, for defects in the declaration, and non-suit in a second, awarded on demurrer to the plaintiff's evidence, are sufficient to abate or to bar a third action for the same cause. These are the matters set up in the motion. If they were presented by plea they might or

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might not be good: Code, sections, 3362, 3063, 2897, 3577, 3826, 2932. On demurrer to evidence, see 42 *Georgia Reports*, 53; 15 *Ibid.*, 492; 13 *Ibid.*, 334; 12 *Ibid.*, 424.

Judgment affirmed.

**THE COTTON STATES LIFE INSURANCE COMPANY, plaintiff
in error, *vs.* WILLIAM J. MALLARD, defendant in error.**

1. A contract made by the general agent of a life insurance company, charged with the duty of appointing sub-agents, whereby he obligated the company to pay the sub-agent a fixed sum per month, and signed the contract as general agent for the company, is the contract of the company, and the company and not the general agent is responsible to the sub-agent for such salary.
2. When the charter gives the general agent "the management of his department and the state agencies," "the appointment of agents and direction of their work under his control, *subject to the approval of the officers of the company*," the latter words do not mean that the approval of the officers of the company is a condition precedent, necessary to the appointment of all sub-agents and every direction of their work, but they mean simply to reserve to such officers a supervisory control over the sub-agents and their work, including their appointment, and until the officers do, by some act, intervene and nullify the contracts appointing the sub-agents and the orders directing their work, the appointments, contracts and orders of the general agent are valid and binding upon the company.
3. The sub-agents are not bound by a private contract made between the company and their general agent limiting the powers of the general agent to guaranty salaries; they are bound with notice and knowledge of the provisions of the charter, which is a public law, but not of a private contract unless actual knowledge be brought home to them. Therefore, in the absence of proof of knowledge in the sub-agent, if the general agent exceed his powers limited in the private contract between him and the company, the company will still be bound to the sub-agent, and the general agent who exceeded his powers will be bound to reimburse the company.
4. Whether the sub-agent in this case faithfully discharged his duties to the company, under his contract, was a question of fact for the jury under the proof which, to say the least, is conflicting, and the jury having passed upon that question, and the presiding judge having approved their finding, oft repeated decisions of this court demand that the verdict shall stand.

Principal and agent. Contracts. Corporations. Notice.
New trial. Before Judge PEEPLES. Fulton Superior Court.
October Term, 1875.

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This case was tried before Judge Hopkins. The motion for a new trial was heard by his successor, Judge Peeples.

Reported in the opinion.

Fry & King, for plaintiff in error.

S. D. McConnell, for defendant.

Jackson, Judge.

This was a suit brought by plaintiff against defendant to recover wages as agent of the latter, founded on a contract made by John W. Burke, as general agent of defendant. It appears from the evidence that Burke signed as general agent of the company, but made the contract for the company, describing it as party of the one part, and Mallard as party of the other part. It appears, also, that Burke was restricted in his private contract from agreeing to any salaries but a certain per cent., but this was not known to the sub-agent, Mallard. The charter gives the general agent "the appointment of agents and direction of their work," and "the management of their departments and of state agencies," subject to the approval of the officers of the company. The testimony was conflicting whether the agent, Mallard, discharged his duties faithfully. The pleas were the general issue, and to the effect that Burke exceeded his powers as general agent, and the contract did not bind the company; that the contract was invalid until approved by the officers of the company, and that by its terms and signature, it did not bind the company, but Burke. The jury found for Mallard against the company, the court below refused to grant a new trial, and we affirm the judgment for reasons appearing sufficiently to be understood by the head-notes. The clause of the charter is in these words: "The general agent of the company shall have the management of the department and state agencies, shall have the appointment of agents and direction of their work under his control, subject to the approval of the officers

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of the company, whose duty shall also be to visit each department twice every year, or oftener, should the interest of the company require it." Acts of 1868, page 43.

Judgment affirmed.

GADSDEN DAVIS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. An indictment containing a count for robbery, and one for assault and battery, is demurrable.
2. It was error in the court to charge the jury that "this case has already consumed too much unnecessary time. I have allowed this prisoner great latitude in introducing evidence at unseasonable times, in order that he might show, if he could, his innocence."

Criminal law. Indictment. Charge of Court. Before Judge CLARK. Houston Superior Court. November Adjourning Term, 1875.

It is only necessary to add to the report contained in the decision, the explanatory note annexed by the judge to the charge set forth in the second head-note, upon certifying the grounds of the motion for new trial to be true. This note is substantially as follows: It has been my practice to allow our colored population every indulgence, knowing their want of legal knowledge. I went much further, and charged the jury that they were the sole judges of the guilt or innocence of the prisoner; that they were bound to decide solely from the evidence, and not be in the least influenced by his color or condition in life, and that as to his guilt or innocence, the court did not and could not express an opinion; it was for the jury alone to decide.

DAVIS & NOTTINGHAM, for plaintiff in error.

C. J. HARRIS, solicitor general, by S. HALL, for the state.

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WARNER, Chief Justice.

The defendant was indicted for the offense of robbery, and on the trial therefor, was found guilty. A motion was made for a new trial on the several grounds stated therein, which was overruled by the court, and the defendant excepted.

It appears from the record that the indictment contained two counts, the one charging the defendant with the offense of "robbery," the other charging him with the offense of an "assault and battery." On being arraigned, the defendant demurred to the indictment on the ground that he was charged therein with two separate and distinct offenses—one of which was a felony, the other only a misdemeanor. The court overruled the demurrer, and that is one of the grounds of the motion for a new trial.

The court charged the jury, amongst other things, as follows: "Gentlemen of the jury, this case has already consumed too much unnecessary time. I have allowed this prisoner great latitude in introducing evidence at unseasonable times, in order that he might show, if he could, his innocence." This charge of the court is also one of the errors complained of in the motion for a new trial.

1. In our judgment, the court erred in overruling the defendant's demurrer to the indictment. Whilst two or more counts, charging the defendant with the same species of felony may be joined in the same indictment, as well as different counts charging the defendant with misdemeanors, still, the indictment is demurrable when it contains two counts—the one charging the defendant with an offense amounting to a *felony*, and the other charging him with an offense which amounts to a *misdemeanor* only, and the reason is that it would embarrass the defendant in the selection of a jury, for he might be willing that a juror should try him for the one offense, and not for the other: 1 Chitty's Criminal Law, 253-4-5; *Lynes vs. The State*, 46 Georgia Reports, 208.

2. The charge of the court to the jury complained of, was also error, as it was calculated to prejudice the defendant's

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case, which was then about to be submitted to them for their verdict, notwithstanding the explanatory note of the judge contained in the bill of exceptions. The clear inference which the jury would naturally draw from this charge was that the court believed the defendant guilty, and that he had allowed him great latitude to show his *innocence*, if he could, but that he had already consumed too much time unnecessarily in attempting to do so. This charge of the court, to say the least of it, was calculated to hurt the defendant, and most probably did hurt him. As there is to be a new trial, we express no opinion in relation to the evidence in the case, or as to the other grounds contained in the motion.

Let the judgment of the court below be reversed.

WILLIAM MANRY *et al.*, plaintiffs in error, *vs.* SUSANNAH SHEPPERD, defendant in error.

1. Where execution is against principal and surety, the plaintiff may proceed against the property of either, at his option.
2. The exception to this rule established by the Code, sections 1819, 2508 and 3387, as to judgments recovered on the bonds of administrators, executors or guardians, does not apply to judgments founded on the bonds of other trustees. The letter of these sections will not be extended by construction.
3. That the plaintiff has dismissed a levy upon the principal's land, is no obstacle to enforcing the execution against the property of the surety.
4. After affirmance in the supreme court, the plaintiff is not obliged to enter up judgment against the surety on the *supersedeas* bond, before taking out execution against the defendants in the original judgment.
5. Failure of the clerk to comply with section of the Code, 3685, by omitting to indorse on the execution the date and amount of the judgment, does not make the whole execution illegal, or prevent collection of the principal and interest.
6. To an execution issued from the superior court, it is no valid objection that the judgment was rendered upon a declaration which did not describe the defendants as being of the county in which suit was brought.
7. Affidavit of illegality is not a remedy for excessive levy.
8. A judgment against William Manry is misdescribed in an execution which states that the judgment was rendered against William Manry, junior,

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when the two names apply to different persons, both of whom reside in the county.

9. Such misdescription renders the execution illegal; and, though amendable, any levy pending when the amendment is made, must fall: Code, section 3495.

Execution. Principal and surety. Practice in the Superior Court. Levy and sale. Jurisdiction. Illegality. Before Judge HALL. Calhoun Superior Court. September Adjourned Term, 1875.

Susannah Shepperd brought suit against Samuel C. Saxon, as principal, and William Manry and Redding Strickland, as securities, on a bond for the faithful accounting by the said Saxon as trustee for the plaintiff. The jury returned a verdict for the plaintiff for \$592 01, principal, with interest, and judgment was rendered accordingly. On writ of error to the supreme court an affirmance was had. Execution issued, and on April 3d, 1875, was levied on certain land, which was pointed out by Manry as belonging to his principal. On May 28th this was dismissed by plaintiff's attorney, and a levy made on other property which was pointed out by him. To this levy the securities filed their affidavit of illegality on the following grounds: 1st. Because the levy made on the principal's property, as pointed out by Manry, was dismissed, and a levy made on the property of the securities instead. 2d. Because, after the affirmance of the judgment by the supreme court, the plaintiff did not enter up judgment against the securities on the *supersedeas* bond, but proceeded directly against the property of the original securities. 3d. Because the *fi. fa.* did not follow the judgment in this, that it issued against William Manry, junior, and Redding Strickland, as securities, etc., whereas the judgment was against William Manry and Redding Strickland, as securities, etc.; and that William Manry, junior, resides in Calhoun county, and is no party to this suit. 4th. Because there is no indorsement by the clerk on the *fi. fa.* as to the time it was issued, nor the date or amount of the judgment. 5th. Because the original declaration does not allege that any of the defendants

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reside in Calhoun county, so as to give jurisdiction to the superior court thereof; nor have any of them pleaded or had their day in court. 6th. Because the levy was excessive.

At the trial, defendants amended their affidavit by adding that the property pointed out by Manry was assets in the hands of Saxon's administrators, (he being dead,) and subject to levy under the aforesaid judgment; and that the dismissal of the first levy was the result of a fraudulent agreement between such administrators and plaintiff.

Plaintiff, on motion, amended the *fi. fa.* by striking out the word "junior" after Manry.

He then demurred to the affidavit of illegality. The demurrer was sustained, and the execution ordered to proceed. To this defendants excepted.

VASON & DAVIS; J. J. BECK, for plaintiffs in error.

R. F. LYON; L. D. MONROE, for defendants.

BLECKLEY, Judge.

We think there was no error in overruling the affidavit of illegality on any of the grounds except the third, which is disposed of in the eighth head-note. That ground was good, in substance; and the plaintiff virtually yielded the question by amending the *fi. fa.* The Code is express, that a levy pending when such an amendment is made, falls. Why does it fall? Not because it becomes illegal by the amendment, but because it was illegal before, and remains so: Code, section 3495.

Judgment reversed.

Hamberger *vs.* Easter, Peggy, Griffin *et al.*

LOUIS HAMBERGER, plaintiff in error, *vs.* **EASTER, PEGGY, GRIFFIN *et al.***, defendants in error.

(BLECKLEY, Judge, did not preside in this case.)

1. A decree, framed upon a bill for direction by the executor of a will, which does not fix the amount due by such executor, but directs him to pay out the estate when collected, to certain general legatees, after retaining a certain sum in his hands to pay counsel fees and allowances to himself, under the will, and another sum for a specific legatee, and to report his actings and doings thereon, from term to term, is not such a final decree for money as to constitute a lien upon the property of complainant from the date of its rendition in favor of such general legatees.
2. If the entire estate, in lands, be levied upon, and the issue be whether the whole is subject or not subject, and the whole is found subject, under an erroneous charge of the court, which left no option to the jury, but forced them so to find, this court will send the case back for a new trial, though it may be that the facts show that the equity of redemption was certainly subject to the *f. fa.*, and though the facts also raise certain questions of priority of liens of plaintiffs in *f. fa.* over the claimant, arising from the assumption that the debt of the plaintiffs was a trust debt, and the claimant's papers on which he based his claim, was only a mortgage, especially if the pleadings, as disclosed in the record, made no such points, and none such appear to have been passed upon by the court below. Whilst all the equities between the parties may be adjudicated in a claim case, and the verdict and judgment may be so moulded as to do justice to all, yet the pleadings must be so framed as that the records of the court shall show harmony between them and such verdict and judgment.

Administrators and executors. Decree. Lien. Equity. Claims. Before Judge BUCHANAN. Muscogee Superior Court. November Term, 1875.

Reported in the opinion.

INGRAM & JOHNSON, for plaintiff in error.

BLANDFORD & GARRARD, for defendants.

JACKSON, Judge.

This was a claim case, wherein Easter and others were the plaintiffs in execution, and Hamberger was the claimant. It arose upon the following state of facts: Owen Thomas died

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and left a will, of which he made James K. Redd the executor. Redd, as such executor, filed a bill for direction in Muscogee superior court, in 1871. There were several important and difficult questions to be settled by the decree for direction to be rendered in pursuance of the prayer of said bill. At the November term, 1873, a decree was rendered, wherein the executor was directed to pay certain specific legacies, to retain a certain amount as compensation for himself, and as attorney's fees, and then to divide the remainder of the estate, when collected, between twenty-six persons; and the executor was directed to report, from time to time, the condition of the estate. At the May term, 1874, the executor reported that he had paid the legatees \$10,000 00 in full of all they claimed, and had paid to their counsel, by virtue of an agreement in writing and by their direction, \$10,000 00, except about \$3,300 00, which was still due, and which he had on hand in cash and assets. At the May term, 1874, an order was obtained that an execution issue for the sum of \$1,433 49, being the amount still due M. H. Blandford, Esq., one of their counsel. The execution of course was to issue in the name of the legatees, and which was accordingly issued on the 2d of November, 1874, and levied the same day on a house and lot in Columbus, as the property of Redd, who died shortly thereafter, in the same month. Hamberger claimed this property by virtue of a deed made to him by Redd on the 19th of March, 1874, for the consideration expressed therein of \$5,000 00. This deed was immediately recorded. On the same day Hamberger gave to Redd a bond, reciting that he had advanced \$3,000 00 to Redd, and if Redd should pay him this \$3,000 00, with interest at fifteen per cent. within twelve months, then he would make him a deed back to said lot, and if not paid, then the first deed to be irrevocable; this bond was not recorded. On the trial of the claim case these facts were introduced in evidence, and the court charged the jury that the decree rendered on the said bill for direction in 1873, was such a decree as bound the property of Redd from its rendition; and if such a decree was rendered it was the

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duty of the jury to find the property subject to the execution. The jury, of course, found the property subject, and the question is whether this charge of the court was correct.

1. A decree for money binds all the property of the defendant just as a judgment at law does. It operates as a lien upon defendant's property: Code, section 4217. Is the decree in this case a decree for money against Redd so as to operate as a lien upon his property? We think not. In the first place, he is the complainant and not the defendant; in the second place, his was a bill for direction to whom to pay the estate when reduced to money, and not to fix the amount due by him to the estate; in the third place, the decree does not fix any specific sum of money due by him to anybody, unless the payment of the legacy of \$2,500 00 be such a fixed sum; in the next place, the decree was not final in ascertaining the amount due by the executor, but as he collected money from time to time and paid out the same, he was to report thereon to the court. When the estate was turned into money, he was to retain a part and pay the balance to these plaintiffs. He thought it would turn out \$25,000 in money, and so said in the bill, but it did not, and he afterwards settled at \$20,000 00; but the decree fixed no definite sum. The very idea of a lien upon the property of defendant involves in it the certainty of that lien in respect to amount. The reason is that all persons dealing with the defendant in the decree or judgment may know how much his property is involved, what is the amount of the lien upon it, and what they can afford to give for it when they bargain subject to the lien. The policy of the law is against incumbering or tying up property with general liens upon all that a man possesses, without any regard to the amount of the debt for which his property is bound. Construing the sections of the Code upon this subject, such seems to be the plain intent and spirit of the law: Code, section 4215, 4216, 4217. How could an execution for money have issued on this decree? The sum due was to be afterwards ascertained, whereas a *fi. fa.* is for a sum certain. For these reasons we think that the court erred in

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charging that this decree, from its date, bound all the property of Redd so as to prevent Hamberger from trading for it thereafter; and inasmuch as Hamberger's title or claim was founded on a transaction in March, 1874, and the decree was rendered in November, 1873, the charge absolutely controlled the case, and the jury were obliged to find the property subject.

2. It was said in the argument, though it does not appear from any pleadings in the record, or any charge of the court, that the point was made on the trial that the property was subject any way, because Hamberger's papers amounted in effect only to a mortgage, and the equity of redemption of the property was subject; that is, that the property was subject to sale under the incumbrance of the mortgage. But the levy was upon the entire property, the issue was joined upon all, and the jury found the whole of it—the entire estate in it—subject, and were obliged to do so under charge of the court. If the verdict and judgment condemning the whole estate under this charge had been allowed by the claimant to stand, he might have been estopped forever from setting up any equities he might have to any part of this estate, or any lien thereon. What is the legal effect of the transaction between Hamberger and Redd, and what title, if any, or what lien, if no title, he obtained, we do not now decide, the pleadings making no such question, and the court below not having adjudicated it.

It was also said that Redd being dead, the debt he owed to the legatees was a trust debt, and in the distribution of his estate it would be held responsible for such a trust debt before it would be required to pay Hamberger's claim. But the pleadings fail also to make this question, and it was not passed upon below by the jury, or the court; besides, Redd had an interest in some partnership property, and the mortgagee, if mortgagee only, might have forced the plaintiff upon that fund. It was also said that Hamberger's transaction with Redd was coupled with a secret trust, and was therefore void. For the same reason, to-wit: because no such point was made

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or passed upon by the court below, so far as this record discloses, we decline to review it here.

We know that a claim case is in the nature of an equitable proceeding, and that, at all events, under our judicial system, all equities may be set up and determined as well at law as in equity, and that the verdict and judgment may be so moulded as to do full justice to all the parties; but this court has ruled that the pleadings must be so framed at law as to authorize the verdict and judgment to be so moulded. We simply decide in this case that the court, by its charge that the decree rendered on this bill for direction bound all the property of the complainant in that bill from the date of its rendition, was erroneous, and as it absolutely controlled the verdict of the jury, and constrained them to find *the whole property* subject to the *f. fa.*, we reverse the judgment, and grant a new trial, leaving the other points made in the argument to be adjudicated on proper pleadings by the court below, and, if necessary, to be reviewed here.

Judgment reversed.

JOSEPH A. SHEWMAKE, administrator, *et al.*, plaintiffs in error, *vs.* NEWTON T. JOHNSON *et al.*, executors, defendants in error.

(JACKSON, Judge, having been of counsel, did not preside in this case.)

Where executors filed their bill for direction in the administration of their testator's estate, praying that the creditors be enjoined from proceeding to collect their debts, in the county of the residence of a debtor to the estate who had been garnished by the creditors, against whom no substantial relief was prayed, such residence did not give the superior court of that county jurisdiction.

Equity. Jurisdiction. Venue. Before Judge HILL.
Bibb County. At Chambers. June 9th, 1876.

Reported in the decision.

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S. D. KILLENS; DUNCAN & MILLER; T. B. LOYD, for plaintiffs in error.

R. F. LYON; S. HALL, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainants, as the executors of S. C. Bryan, late of the county of Macon, deceased, in the county of Bibb, against N. T. Johnson, garnishee, and others, one of whom was a judgment creditor of said Bryan, praying for directions as to how they should administer the estate of their testator under his will, in view of the alleged complicated condition of the assets belonging to the estate and the respective claims thereon, and also praying for an injunction to restrain the creditors of their testator from proceeding to collect their debts, especially the principal judgment creditor thereof. On hearing the application for the injunction prayed for, the chancellor overruled the defendants' demurrer to the jurisdiction of the court in the county of Bibb, and also overruled the defendants' demurrer to the bill for want of equity, and granted the injunction, whereupon the defendants excepted.

The only defendant residing in the county of Bibb, to give the court of that county jurisdiction, was N. T. Johnson, the garnishee, who was a mere stakeholder, and had no interest in the final distribution of the testator's estate under his will, or otherwise, and according to the theory of the complainants' bill, they were not entitled to the substantial relief prayed for as against him. The substantial relief which the complainants' bill seeks to obtain is against other parties defendant, who are not alleged to be residents of the county of Bibb, and therefore, the superior court of that county did not have jurisdiction of them to grant the relief prayed for, and the chancellor erred in overruling the defendants' demurrer to the jurisdiction of the court as to them. By the constitution, equity cases shall be tried in the county where a defendant

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resides, against whom substantial relief is prayed. The 4183d section of the Code declares that "All bills shall be filed in the county of the residence of one of the defendants, against whom substantial relief is prayed, except in cases of injunctions to stay pending proceedings, when the bill may be filed in the county where the proceedings are pending, provided no relief is prayed as to the matters *not* included in such litigation." The principal and substantial relief prayed for in the complainants' bill is as to matters *not* included in the litigation pending in the county of Bibb, but relates to other matters, and the rights of other parties, outside of that litigation, having no necessary connection with it. Inasmuch as the superior court of Bibb county had no jurisdiction to hear and decide the case as made by the complainants' bill, we express no opinion as to the merits of the question involved in it.

Let the judgment of the court below be reversed.

THOMAS H. HARRIS *et al.*, plaintiffs in error, vs. B. DUB, defendant in error.

1. Where the proprietor of the Lanier House rented "the saloon or bar-room and fixtures" thereof from 1st of October, 1873, for one year, and contracted that the tenant "shall have the exclusive privilege of selling wines, liquors of all kinds, and cigars and tobacco, *in said Lanier House*," and suit was brought on the rent-notes, and the tenant pleaded that he did not have the exclusive privilege of so selling, because another bar-room, rented to Engelke, was kept in the Lanier House, the question whether said latter bar-room is in the Lanier House, in the sense of the contract as understood by the parties, is for the jury; and a charge that "if Dub did not rent to Engelke, and had no control over the room occupied by him as a bar-room, even if the said Engelke did sell wines, etc., it was no breach of plaintiff's contract and will not avail the defendant," is too broad; the true question being, not whether Dub rented to Engelke but whether Harris, when he rented from Dub the bar-room he occupied, understood the words "Lanier House" in the contract, to include the whole building called Lanier House, embracing Engelke's bar-room, or only the hotel called by that name, and was authorized so to understand its meaning from what passed between Dub and Harris when the contract was made. The fact that Dub did not rent Engelke's bar-room and could not therefore control it, is a

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very strong circumstance that he did not contract, and that Harris did not understand him to contract, that Engelke should not sell wines, etc., therein, but by itself it is not conclusive.

2. Testimony upon the point what *the Lanier House* ordinarily meant and included in common parlance, whether the entire building or only the hotel, was legitimate to illustrate the meaning which the parties attached to it in the contract.
3. The fact that the defendant quit the bar-room in March, offering the control to plaintiff, and that the plaintiff sent for the keys "some time" in August, and never tendered them back to defendant, was a presumption of the possession and dominion in August, and the rent should cease from that date, though plaintiff swore that he only took possession to paint the counter.
4. Where, notwithstanding such error in the charge of the court, the evidence, as a whole, satisfies this court that the verdict on the main question for the plaintiff was right, and would be and ought to be the same if tried over again, except for the short time from August to October, the judgment will be affirmed if the plaintiff will write off the rent for the last month; if not, a new trial must be granted.

Landlord and tenant. Contracts. Evidence. New trial. Before Judge HILL. Bibb Superior Court. October Ad-journed Term, 1875.

Reported in the opinion.

A. O. BACON; J. & J. C. RUTHERFORD, for plaintiffs in error.

WHITTLE & GUSTIN; WASHINGTON DESSAU, for defendant.

JACKSON, Judge.

In this case Harris rented a bar-room in the *Lanier House* from Dub, and gave his notes at \$90 00 per month therefor. The rent was for one year. Harris abandoned the room in March, and notified Dub. In August, some time, the date is not precisely fixed, Dub sent to Harris for the key, and never returned it. He said, as a witness, that he sent for it to have the counter painted. When Dub sued on the rent-notes Harris pleaded that he quit the bar-room because Dub had not prevented one Engelke from selling wines, etc., in the *Lanier*

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House, according to contract. Engelke rented a bar-room in the building known as the Lanier House, but not in the hotel of that name, and not from Dub, and the point in dispute was whether the contract bound Dub to keep Engelke from selling wines, etc.

The evidence may be slightly conflicting, but it is, we think, overwhelmingly in favor of the verdict except for the short time that Dub resumed possession of the bar-room by sending to Harris for the key, and that was some time in August, as Harris himself swore. The court, we think, was too broad in his charge noticed in the head-notes, but as we think the verdict must always be for the plaintiff on the main question, we shall let it stand if plaintiff will write off one month's rent, \$90 00, for September. We put it at one month, because defendant swore he sent the key to plaintiff *some time* in August, and as his is the only evidence *as to the time*, we put it most strongly against him *to the last of August*, and only deduct one month's rent. With this statement the case will be sufficiently understood by the head-notes.

Judgment reversed, with the direction that it stand affirmed if plaintiff will write off \$90 00 from the entire rent.

STEPHEN M. LESTER, plaintiff in error, *vs.* BROWN & CARMICHAEL, defendants in error.

The form of judgment prescribed where no issuable defense on oath is filed, is merely directory, and the omission of the words "on oath" from the recitals therein does not invalidate the judgment.

Judgments. Pleadings. Before Judge CLARK. Sumter Superior Court. April Term, 1876.

JOHN R. WORRILL; J. A. ANSLEY; ALLEN FORT, for plaintiff in error.

W. A. HAWKINS; N. A. SMITH; B. P. HOLLIS, for defendants.

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WARNER, Chief Justice.

This was a motion to set aside a judgment in the court below, on the ground that it appears on the face of the judgment that it was not rendered according to law. The other grounds taken in the motion not being supported by any evidence, as certified by the presiding judge, were not insisted on here. The judgment sought to be set aside, after stating the names of the parties, recites that the defendant having been personally served with the declaration and process in the case and the defendant having filed no issuable plea therein, it is considered and adjudged by the court that the plaintiffs have judgment, and that they recover of the defendant the sum of \$902 50 for their principal damages, with interest and costs, etc., in the usual form, and signed by the presiding judge. The court overruled the motion to set aside the judgment, and the defendant excepted.

It was insisted on the argument that the judgment was illegal and void, because it did not recite that the defendant had not filed an issuable defense *on oath*. The superior court is a court of general jurisdiction, and had the legal power and authority to render the judgment in question when there was no issuable defense filed on oath. The record of the case in which the judgment was rendered shows upon its face that no issuable defense was filed on oath by the defendant, and the record is the highest and best evidence of that fact, and must control the question, whatever may be the recitals in the judgment. The form prescribed for entering judgments in such cases is merely directory, and a departure therefrom would not render the judgment void; the most that could be claimed would be that the judgment was irregular, and subject to be amended as to the form of it, but it is not void, and there was no error in overruling the motion to set it aside. If the thousands of dollars that have been spent by the people of this state, since the war, in unnecessary and useless litigation, had been applied to the payment of their honest debts, or invested in substantial improvements, the

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country would have been in a much better condition than it is now. Excessive and factious litigation will be found to be an expensive luxury to those who choose to indulge in it.

Let the judgment of the court below be affirmed.

**WILLIAM P. JOWERS, plaintiff in error, *vs.* JAMES L. BAKER,
defendant in error.**

1. Where the action is by a partner against his copartner for an alleged breach of contract to furnish timber and saw-logs to meet the demands of a mill and keep it constantly running, it is error for the court to charge the jury that "nothing definite having been said as to the quantity to be furnished, then the obligation upon the part of the defendant was to furnish as many stocks as might be sawed with profit, and reasonably necessary for the greatest success of the partnership enterprise." The form of the charge is not quite free from objection, inasmuch as the jury may have understood the court to mean that nothing definite was in fact said as to quantity; but the substance of the charge is clearly inapplicable to the declaration, which does not seek a recovery for failure to furnish as many stocks as might be sawed with profit and reasonably necessary for the greatest success of the partnership business, but for failure to furnish enough to meet the demands of the mill and keep it constantly running.
2. There being no evidence that the defendant did not know he was not furnishing stocks enough to run the mill to its full capacity, but, on the contrary, his own statement to the jury, on the trial, being that he did not furnish enough, and that the plaintiff complained to him of the deficiency, it was error to charge the jury that if the plaintiff had the management and control of the mill, the defendant was entitled to notice of the deficiency, so that he might have fulfilled his obligation.
3. Generally, when a partner undertakes to perform a distinct part of the common business, he must know for himself whether he is discharging his duty or neglecting it. He may urge a waiver of strict performance, but cannot excuse his failure on the ground of voluntary ignorance.

Contracts. Charge of Court. Partnership. Before Judge CRAWFORD. Marion Superior Court. April Term, 1876.

Jowers brought complaint against Baker. The declaration presented the following facts: In September, 1871, these parties entered into a verbal agreement or contract for the purpose

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of conducting a saw-mill business. Plaintiff was to furnish the mill and fixtures, and to keep them in running order; defendant was to furnish at the mill sufficient lumber to keep it constantly running; the partnership to last six months, or longer by agreement, and in no event should either party stop the business without notice to the other. Plaintiff fully complied with his part of the contract. Defendant did not, but only furnished lumber enough to run the mill about one-half the time, so that while the cutting capacity of the mill was seven thousand feet per day, only three thousand five hundred feet were sawed. Moreover, defendant stopped the business for a month without notice to plaintiff. Lastly, defendant borrowed from plaintiff a yoke of oxen with which to haul saw-logs, and by neglect and abuse considerably lessened their value. The entire damage was laid at \$3,844 75.

Defendant pleaded the general issue.

On the trial, the evidence for plaintiff made the following case. The contract was as stated in the declaration. After conducting the business together for some time, plaintiff, by consent of defendant, rented his interest in the mill to one Lidy, who was to hold under the same contract. Afterwards there was some dissatisfaction between the parties, and plaintiff took back the mill, and continued the business with defendant as formerly. The sawing capacity of said mill was from five thousand to seven thousand feet of lumber per day, worth from \$1 00 to \$1 50 a hundred. Defendant failed to furnish logs sufficient to keep it running, so that it was idle from one-third to one-half the time. Plaintiff complained to defendant about this, but it was not remedied. Plaintiff bought a yoke of oxen for \$90 00 and allowed defendant to use them in hauling logs; their value was much diminished in this service.

The evidence for defendant was similar to the above, with one exception, to-wit: Defendant testified that he agreed to furnish logs for the mill, not that he would furnish enough to keep the mill *constantly running*, nor did he do this.

The court charged, amongst other things, as follows: "No-

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thing definite having been said as to the quantity to be furnished, then the obligation on the part of the defendant was to furnish as many stocks as might be sawed with profit, and were reasonably necessary for the greatest success of the partnership enterprise. The strictest good faith between partners being always required, if the plaintiff had the management and control of the mill, and the quantity of stocks was not sufficient to run the mill to its full capacity, then the defendant was entitled to notice of the deficiency, so that he might have fulfilled his obligation."

The jury found for the defendant. Plaintiff made a motion for a new trial, one of the grounds of which was the above charge. The motion was overruled, and plaintiff excepted.

T. H. PICKETT, by W. A. LITTLE, for plaintiff in error.

BLANDFORD & GARRARD, for defendant.

BLECKLEY, Judge.

1. The contract declared upon was construed by this court at July term, 1875, on a writ of error in the same case between the same parties: *Jowers vs. Baker*, 55 *Georgia Reports*, 184. Until the plaintiff has proved substantially *that* contract, and a breach thereof by defendant, he cannot recover. While the declaration stands as it is, there is no propriety in instructing the jury upon any other contract, further than to tell them that no other contract imposed any obligation that is now sought to be enforced. A case should be tried on the pleadings as well as on the evidence. Let each party stand by what he has pleaded, and bring up his evidence, if he can, to what he has thus put on the record. If his pleading is defective, let him amend, so far as the rules of amendment allow; but until he does amend, the court and jury should both hold a firm grasp on the precise matters alleged. In finding a general verdict, it is not enough for the jury to ascertain what the facts are; they must go further, under proper instructions

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from the court, and determine whether or not the facts established support the declaration. We think it was quite irrelevant to charge the jury on any obligation to furnish as many stocks as might be sawed with profit and reasonably necessary for the greatest success of the partnership enterprise. If this was meant as a measure of the defendant's obligation under the contract declared upon, it was a different measure from that which this court recognized and announced when the case was here before. If, on the other hand, it was meant to apply to some other contract, the jury were drawn off to deal with a case other than the one on trial. The harm to the plaintiff in thus diverting their attention was this: On that branch of the case which related to quantity, the jury were concerned to know what was requisite to keep the mill constantly running; if they thought the contract was, in fact, as alleged, that was the quantity for them to work out; but instead of concentrating on that, they were allowed to straggle off upon the inquiry as to how much was reasonably necessary for the greatest success of the partnership enterprise. With this inquiry they had, or should have had, nothing to do. How much could the mill have sawed? How much less did the defendant furnish? What, if anything, was the plaintiff's loss on the difference? These were the three remaining questions, if the jury were satisfied that the contract was what the plaintiff alleged it to be; and if they believed, from the evidence, that such was not the contract, there was no remaining question at all—the case was at an end. The form of the charge was also a little open to misconstruction, as the jury may have understood the court to intimate an opinion that nothing definite was said as to quantity in making the contract.

2. It seems to us that the charge on the subject of notice to the defendant was not called for. The defendant's position was, that he never contracted to furnish stocks to the full capacity of the mill. His own sworn testimony was, that he did not furnish that many, and that the plaintiff complained to him of a deficiency. He neither pleaded nor proved want of

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notice. He claimed to be free by his contract to furnish less than enough to keep the mill constantly running. Notice to him was not in issue.

3. But if it had been, surely it was enough for the plaintiff to complain to him, without giving him any other notice. Generally, a man should attend to what he has contracted to do, without either complaint or notice from his associates in business. For aught that appears, the defendant knew quite as well as the plaintiff what supply was needed and what was furnished. The mill was on his land, and probably was as convenient to his personal observation as to that of the plaintiff. If the supply was short, and the plaintiff, knowing the fact, and having convenient opportunity to complain, or remonstrate, his failure to do so, if he did fail, might be taken as a waiver of strict performance. But in the absence of such waiver, the defendant could take no benefit from his voluntary ignorance of his own shortcomings. Let the case be tried over.

Judgment reversed.

MARY E. M. SINDALL, plaintiff in error, *vs.* JAMES S. JONES, DRUMWRIGHT & COMPANY, defendants in error.

1. Statements of a husband in the presence of his wife and not denied by her, are admissible, the jury being properly cautioned by the court, in the charge, that they "must be satisfied that she was under no constraint whatever by the presence of her husband, but was perfectly free to assent or dissent as she desired," and also that the statements were "made under such circumstances as required an answer or denial from the wife," before they could be held as admissions against her.
2. Where the wife, abandoned by her husband, had made application for a homestead in a house and lot as his property, the same having been attached by certain of the husband's creditors, to whom and to others he was overwhelmingly in debt when he left the state, and the attaching creditors settled the case with her by purchasing the property from her at \$1,000 00, it being worth \$4,000 00, and where she also held title to the property in her own name, but the deed was attacked for fraud as being paid for largely

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with her husband's money, and where the attaching creditors assumed all risk of litigation with others concerning the property:

Held, that on a bill filed by the wife to set aside the sale, or to recover the difference between the real value of the land and the price paid, and verdict and decree for defendants, this court will not control the discretion of the presiding judge in overruling a motion for a new trial, the evidence being sufficient to sustain the verdict, and the law having been fairly administered.

Admissions. Evidence. Husband and wife. New trial.
Before Judge HALL. Spalding Superior Court. August Term, 1875.

Reported in the opinion.

R. F. LYON; S. D. IRVIN; BOYNTON & DISMUKE, for plaintiff in error.

SPEER & STEWART, for defendants.

JACKSON, Judge.

Sindall left the state overwhelmingly in debt. His wife and child remained in Griffin. Certain creditors, defendants in this bill, attached his house and lot, or that in which he left his family. Mrs. Sindall applied for a homestead in the house as her husband's property. She also held a deed to it in her own name, but this deed was attacked for fraud, on the ground that her husband's money paid largely for it. The attaching creditors bought out her interest, paying for it \$1,000 00, the property afterwards selling for \$4,000 00, and the creditors assumed all risk of fighting off all other claims. Mrs. Sindall filed a bill to set aside the sale, charging inadequacy of price and undue advantage, etc. On the trial the jury found for the defendants; a motion was made for a new trial, the court refused it, and the case is before us for review.

1. The first question is, are the sayings of the husband, in the presence of his wife, and not denied by her, admissible? Sindall stated in her presence as to the amount of her money when the property was bought, and she silently acquiesced

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by saying nothing. The general rule is, that the statements of a third person in the presence of a party not denying, when reasonably called upon to do so, are admissible. Under the qualifications stated by the presiding judge, we see no reason why the principle should not apply to the wife when the husband makes the statement. Those qualifications stated to the jury were, that they "must be satisfied that she was under no constraint whatever by the presence of her husband, but was perfectly free to assent or dissent, as she desired;" and also that the statements "were made under such circumstances as required an answer or denial from the wife." We think this sound and the ruling right.

2. The other question made is, whether the law and facts authorized the verdict. A good many points are made, but no specifications of error in the charge are given; it is only excepted to *as a whole*. We think that, *as a whole*, it submitted the law of the case fully and very fairly for Mrs. Sindall to the jury. The evidence fully authorized the verdict, and we will not control the discretion of the court in refusing the new trial.

Judgment affirmed.

J. & J. KAUFMAN, plaintiffs in error, *vs.* AUSTIN & COMPANY, defendants in error.

The agent of plaintiffs agreed to sell defendants a lot of merchandise at a certain price, and on the arrival thereof presented to them an overcharged bill. They refused to pay it or to take the goods. Plaintiffs' agent offered to deduct the overcharge, but defendants refused to pay. Afterwards, plaintiffs drew on defendants for the same amount as that of the bill. The latter again refused to pay. Plaintiffs sold the goods at a sacrifice, and sued for the loss incurred thereby:

Held, that it was error to charge that defendants should have pointed out the overcharges in the bill when it was presented, and failing to do so they would be liable for the difference between what the goods brought and the amount charged in the bill.

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Sales. Damages. Before Judge CRAWFORD. Muscogee Superior Court. November Term, 1875.

Reported in the decision.

BLANDFORD & GARRARD, for plaintiffs in error.

PEABODY & BRANNON, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendants to recover damages for refusing to receive and pay for a lot of bacon which the plaintiffs alleged the defendants had purchased of them. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the plaintiffs for the sum of \$323 35. A motion was made for a new trial on the following grounds:

1st. Because the court erred in charging the jury, "that if the defendants, when the bill was presented to them, failed to point out the overcharges in the bill to plaintiffs, so that the same could be corrected, that then they were liable to the plaintiffs and could not refuse to take the goods and throw them back on plaintiffs."

2d. Because the court erred in charging the jury, "that if defendants purchased the goods of plaintiffs, to be paid for on arrival, and even if some of them were overcharged, then if defendants failed to point out the mistake to plaintiffs or their agents, but refused to take them, that then plaintiffs could sell said goods, and defendants were liable to plaintiffs for the difference between what the goods sold for and the amount charged on the bill." The court overruled the motion, and the defendants excepted.

It appears from the evidence in the record that Elsberry, a witness for the plaintiffs, testified that, as their agent, he made a contract with the defendants to sell them a lot of bacon at the prices charged in the bill, to-wit: clear ribbed sides at fifteen and three-eighths cents, and shoulders at ten and one-

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eighth cents; said bacon to be delivered free of charge on board the cars at Louisville. On the arrival of the bacon at Columbus, witness presented the bill to defendants, on which was charged \$30 32 for drayage and brokerage; the defendants refused to pay it and receive the bacon, because the amount charged in the bill was not in accordance with the contract. Witness stated that the charge of \$30 32 for drayage and brokerage was not in accordance with the contract made with defendants, and when they refused to pay it, he, as the agent of the plaintiffs, offered to knock it off and receipt them in full for the balance of the bill which was correct according to the contract.

Blackman, a witness for plaintiffs, testified that he presented a draft drawn by the plaintiffs on the defendants in favor of Warren, Mitchell & Company, payable at sight, for the amount of the bill as hereinbefore stated, accompanied with a bill of lading, and that the defendants said that the charge in the bill for drayage and brokerage was wrong and that they would not pay it nor take the bacon. Witness proposed to knock off the amount of the charge for drayage and brokerage and take defendants' draft on Warren, Mitchell & Company for the overcharge, if defendants would pay the balance, which defendants declined to do. Witness then protested the draft, which was in the usual form, with the exception that it contains the following words, the payment of the draft refused the defendants saying "we will not pay the draft; they charged us the wrong price for the goods, and we throw the goods back on them."

The plaintiffs proved that the bacon was sold and brought \$323 35 less than the amount of the bill as charged to the defendants. One of the defendants testified that he only agreed to give fifteen and one-eight cents per pound for the clear ribbed sides, and substantially corroborated the statement of the other witnesses in other respects as to the overcharge for drayage and brokerage, and his refusal to receive and pay for the bacon because of such overcharge in the bill presented therefor by the plaintiffs. This witness also testified that the price of

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bacon was declining from the time of the making of the contract to the time of his refusal to receive it.

Was the charge of the court right in view of the evidence contained in the record? Were the defendants liable to the plaintiffs for refusing to pay the overcharged bill presented for the bacon and declining to receive it, because the defendants failed to point out the overcharge in the bill to the plaintiffs so that the same could be corrected? There is no dispute that the bill for the bacon, as presented to the defendants for payment, was not in accordance with the contract price so far as the charge for drayage and brokerage was concerned. There is a conflict in the evidence as to the price agreed to be paid for the bacon, which was a question for the jury to determine, and that question should have been submitted to them. The plaintiffs' agent, who made the contract with the defendants for the bacon, was the identical party who demanded payment of the overcharged bill in the first instance. Why should the defendants have pointed out to him the overcharge in the bill, who must have known the fact quite as well as the defendants? The plaintiffs' agent did not tell the defendants that there was any mistake or overcharge in the plaintiffs' bill for the bacon before he demanded payment of the full amount thereof.

The plaintiffs made a second attempt to collect from the defendants the full amount of the overcharged bill, through Blackman, by the presentation of a draft drawn in favor of Warren, Mitchell & Company, which defendants refused to pay, for the reason that the charge of \$30 32 for drayage and brokerage was wrong. Blackman proposed to knock off that amount from the bill if the defendants would give a draft on Warren, Mitchell & Company for the overcharge and pay the balance, which they declined to do, knowing, it is reasonable to presume, that if they drew a draft on Warren, Mitchell & Company for the \$30 32, the overcharged amount, that they would have it to pay in addition to the balance of the bill. Because the defendants refused to submit to the terms proposed by Blackman, they were subjected to protest.

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Why should the defendants have been required to point out to Blackman that the bill for the bacon was overcharged by mistake, when there was no evidence that the bill made out by plaintiffs against the defendants for the bacon was overcharged by *mistake*? So far as the evidence in the record shows, the overcharged amount in the bill was made by the plaintiffs with the intention of collecting the same from the defendants. The plaintiffs made two attempts to collect the full amount of the overcharged bill from the defendants, and if they had happened to have died, they probably would have been successful in collecting it out of their representatives, as they might have been entirely ignorant of the terms of the contract. The better policy is to charge the contract price for the goods sold, and not attempt to demand or collect any more than that, and then the purchaser will be compelled to receive and pay for them whether the price of the goods declines in value or not. If the plaintiffs had made the overcharge in the bill by mistake, and had so stated to the defendants when it was presented for payment, and had offered to rectify the mistake, and had demanded payment for only the amount that was justly due under the contract, it would have presented an entirely different question ; but that is not the statement of facts disclosed in the record of this case. The plaintiffs must be presumed to have known what were the terms of the contract for the sale of the bacon and the amount charged in their bill for it, quite as well as the defendants, and there was no evidence of any overcharge in the bill by *mistake*, and therefore the charge of the court, that if the defendants failed to point out the overcharges in the bill when it was presented to them for payment, so that the same could be corrected, or failed to point out the mistake in the bill to the plaintiffs or their agent, but refused to take the goods, that then the plaintiffs could sell them, and defendants would be liable for the difference between what the goods sold for and the amount charged in the bill, was error, and the motion for a new trial should have been granted. The defendants never consented to the terms of the contract for the purchase of the bacon

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which the plaintiffs sought to enforce against them, and therefore that contract, so sought to be enforced by the plaintiffs, was incomplete so far as the defendants were concerned, and could not be enforced against them: Code, section 2727.

Let the judgment of the court below be reversed.

JACKSON, Judge, concurred *dubitante*.

GREEN H. JORDAN, plaintiff in error, *vs.* **J. R. INGRAM**, defendant in error.

When no exception is taken to the charge of the court, the presumption is that the court charged the law correctly; and the question whether a contract made by the partner to pay damages himself, if the stock of defendant should be injured by penning diseased stock of the partnership in the same lot with defendant's, was within the scope of the partnership and binding on the partnership or not, being a question for the jury, under all the circumstances, and they having found that the contract was not within the purview of the partnership, and not binding on the firm, and the presiding judge being satisfied with the verdict, this court will not control the discretion of the court below in refusing to grant a new trial.

New trial. Partnership. Before Judge CRAWFORD. Taylor Superior Court. April Term, 1876.

Reported in the opinion.

W. S. WALLACE, for plaintiff in error.

BLANDFORD & GARRARD, for defendant.

JACKSON, Judge.

Ingram sued Jordan on a note payable to the former individually. Jordan answered by a plea that Ingram was in partnership with another, his son, and that the son got him to pen with his, Jordan's, stock some diseased stock belonging to the partnership; that the note sued on was partnership property, and that the son promised and agreed if Jordan's

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stock should be injured by the diseased stock, he would pay damages; the stock of Jordan was damaged, and he pleaded the fact in recoupment against the note J. R. Ingram sued on. The judge charged the jury the law; no complaint of his charge is made, and it is not in the record; therefore we say he charged the law of the case; and the sole question here is was the verdict right? There was no doubt, we think, about the partnership. The question was, did the partner have the right to bind the firm on this contract to pay damages? We think that if he exhausted all other means of penning the stock, he might perhaps have done so; but the question, we think, was one for the jury; under all the facts of the case, did the partner act so as to bind his copartner? was it the best he could do reasonably at the time, or did he recklessly make a bargain that no reasonable man would have made, and which might have ruined the firm? We suppose that the court submitted this question to the jury, and they found that under the circumstances here disclosed the partner present went beyond his power, and could not bind the partnership. Again, the evidence seems to be that the son, Park Ingram, only bound himself. He said that he would pay all damages. He made no promise for the firm or for his father. The presumption is that the court charged that if he, Jordan, looked to Park Ingram alone, he could not recoup, and the jury were authorized, from the note having been given to J. K. Ingram alone, and the promise made by Park that *he* would indemnify Jordan, that nobody was bound to Jordan about the diseased stock and their damage but Park Ingram. There being enough testimony to sustain the verdict, and the presumption being that the court charged the law correctly, and the presiding judge being satisfied with the verdict, we will not interfere.

Judgment affirmed.

Rosenstein vs. Forester et al.

**HENRY ROSENSTEIN, plaintiff in error, vs. R. A. FORESTER
et al., defendants in error.**

(*JACKSON, Judge, having been of counsel in this case, did not preside.*)

A distress warrant may issue for rent payable in specifics before the same becomes due, when the tenant is removing his property. The landlord can state in his affidavit the value of the specifics agreed to be paid.

Landlord and tenant. Distress warrant. Before Judge CLARK. Lee Superior Court. March Term, 1876.

Reported in the decision.

W. A. HAWKINS; GEORGE KIMBROUGH, for plaintiff in error.

D. A. VASON; R. F. LYON, for defendants.

WARNER, Chief Justice.

This was a distress warrant sued out by a landlord for rent before the rent became due, on the ground that the tenant was removing his property. The rent agreed to be paid was specified in the agreement, to be cotton, corn, cotton seed and fodder. The defendant filed his affidavit, and replevied the property levied on, in which he alleged the rent claimed, or some part thereof, was not due. Upon this issue the case was tried, and a verdict found for the plaintiffs for the sum of \$817 55. After the plaintiffs had closed their evidence the defendant moved the court to non-suit the plaintiffs and dismiss the proceedings, on the ground that a landlord could not distrain for rent before the rent was due, when the tenant was removing his property, where the rent agreed to be paid was in specifics as in this case. The court overruled the motion and the defendant excepted.

The difficulty suggested on the argument here why this could not be done, was that the landlord could not know what would be the value of the specifics agreed to be paid when the same became due according to the terms of the rent con-

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tract. The remedy given by the statute to landlords to distrain for rent due them, is broad enough to include rent agreed to be paid in specifics, as well as rent agreed to be paid in money, and there would seem to be no good reason why the landlord should not have the same right to distrain before the rent becomes due in the one kind of rent as the other, when the tenant is removing his property. The landlord can make affidavit of the value of the specifics agreed to be paid for the rent which he claims to be due, at the time he sues out the distress warrant, upon his own responsibility, as in other cases. In this case the defendant did not deny that he was removing the property, in his affidavit, but stated therein that the sum distrained for, or some part thereof, was not due and replevied the property levied on. There was no demurrer to the defendant's affidavit and the parties went before the court and jury upon the issue as to whether the amount distrained for was or was not due, and the jury found a verdict for the plaintiffs for the sum of \$817 55, which was \$160 07 less than the amount distrained for. There was no motion for a new trial, and there was no error in the refusal of the court to dismiss the plaintiffs' case on the ground that the rent claimed was payable in specifics.

Let the judgment of the court below be affirmed.

**DAVID H. HOUSER, plaintiff in error, *vs.* THE PLANTERS'
BANK OF FORT VALLEY, defendant in error.**

1. Is a corporation, whose charter does not confer the privilege of issuing its bills to circulate as money, a bank, in the sense of the act of 1857, and of the provisions in the first Code on the subject of banks and banking, (sections 1421, 1423,) so as to make all contracts for the loan of money at a greater rate of interest than seven per cent. per annum null and void? *Quare?*
2. By the English law the entire contract, if tainted with usury, was void, yet the money actually borrowed, with the legal interest thereon, was held to be a good consideration to support a new promise to pay the old debt purged of the usury. So, though this corporation were such a bank of

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issue as that a usurious contract would be absolutely void if made before the act of 1873, (Code, sections 2051, 1474,) yet, after the act abolishing all laws against usury, and pending the period when there was no law prohibiting it, the money actually borrowed, with legal interest from the time borrowed, is a good consideration to support a new promise then made to pay at least such sum actually borrowed and the legal interest due thereon.

3. In such case, a plea that the whole consideration on which the new promise was made was illegal, is bad, and should be stricken on demurrer, unless amended; but when the entire pleadings and facts show that the consideration is in part clearly legal, and in part void, and the consideration is severable, though the judgment striking the plea will be affirmed, yet this court will direct that defendant have leave to amend, if so advised, so as to plead inadequacy of consideration as to the usury.

**Corporations. Banks. Interest and usury. Contracts.
Pleadings. Practice in the Supreme Court. Before Judge
CLARK. Houston Superior Court. November Adjourned
Term, 1875.**

Reported in the opinion.

SAMUEL D. KILLEN; W. S. WALLACE; W. A. HAWKINS;
H. K. McCAY, for plaintiff in error.

DUNCAN & MILLER; POE, HALL & LOFTON, for defendant.

JACKSON, Judge.

This was a suit brought by the bank against D. H. Honser to recover two promissory notes, one for \$5,761 00 and the other for \$5,696 00, dated 20th December, 1873. These notes were given in consideration of certain money borrowed by defendant from the bank in 1871 and 1872, and certain interest at the rate of some eighteen per cent. per annum charged therefor. At the time the money was borrowed, and the consideration for which these two notes were given was incurred, the interest was usurious by the law of this State; but after the act of 1873 abolishing all usury laws was passed, and before its repeal, while there was no law against usury, the notes sued on were given for the money borrowed and all interest, legal and usurious. The defendant pleaded that plaintiff was a

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chartered bank and had taken usury at a time when the whole contract was null and void if usurious interest was exacted by a bank of this state; that the consideration for which these notes were given was thus an illegal consideration, usury being part thereof, and that such consideration was not a good consideration to support the new promises made in the shape of these two notes sued on, and the consideration being all void at the time that it was incurred, the new promises had nothing to rest upon and were also void, and there could be no recovery against defendant on the two notes, although at the date of the notes, December, 1873, there was no law against usury in this state. The court held the consideration not illegal, and rendered judgment to plaintiff for the whole amount of the two notes, principal and interest; the defendant excepted, and the question is, was the consideration illegal so as not to support the promise to pay these notes?

1. The first question is this: Is the Planters' Bank of Fort Valley a bank within the purview of the act of 1857, and the first Code, or Irwin's Code, sections 1421-1423, so as to incur the penalty of having the contract declared null and void, if more than legal interest was taken? It is a question whether it be a bank at all. The charter, as a loan and trust company, was first passed in 1868, and not passed constitutionally in either branch of the general assembly, if it was a bank. It is clear that the legislature did not, in 1868, consider the institution a bank, as appears from the journals of the two houses: Senate Journal, 276; House, 478. In 1870 the name was changed from the Fort Valley Loan and Trust Company to the Planters' Bank of Fort Valley, and this change of name was passed by yeas and nays, two-thirds voting for it in one house, but in the other it was passed in the usual way, and still not considered, a bank, it seems, by the senate: Senate journal, part 3, 161; House, part 2, 1239. However this may be, it is clear that it was not made a bank to issue money, bills to circulate as money, and if we examine the act of 1857, and the Codes following and codifying that act, we shall find that all this legislation is full of the idea of

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banks authorized to issue bills for circulation as money. It is quite questionable, therefore, whether this bank could not at all times lend money just as a natural person could, and whether anything but the usurious interest would be forfeited. It is a question, and as a question we leave it, because it does not matter materially in the view we have taken of the case, and the conclusion we have reached.

2. Let us suppose, then, that this institution is a bank, and such a bank as is obnoxious to the prohibition of the act of 1857 and the old Codes against usury, and the annulling of all contracts in violation of those laws, does the fact that it did take usury in 1871 and 1872, when it was prohibited from so doing, and when so doing made the contract null and void, make void the new contract made in December, 1873, when there was no law against usury? Or, in other words, is the first contract so illegal in its totality as to furnish no good consideration to support the mere promise? or, is a contract, void for usury, so illegal that not even the money actually borrowed will support a promise to pay that money and the lawful interest? By the laws of England before and at the time of our adopting statute, every usurious contract was void, and the party taking usury forfeited all the money loaned and was liable for three times the sum loaned: 2 Chitty's Blackstone, 464, note; 1 Saunders, 235; 2 Blackstone's Reports, 792; 4 *Ibid.*, 157. A broker who took or was concerned in taking such usury, was guilty of crime, and incurred the penalty of a *præmunire*: 4 Blackstone, 156, 116. So that the contract, when usury, was taken by a bank before the act of 1873, Code, sections 1474, 2051, could hardly be more absolutely void than all usurious contracts were, by the laws of England, before and at the time of our adopting statute. Yet it was held then that the money actually borrowed was a good consideration to support a new promise to pay principal and legal interest, and such new promise, purged of the usury, would be enforced by the courts: 1 Campbell, 165; 2 Taunt, 184; 2d Stark, 237; 48th *Georgia Reports*, 658; 33 *Ibid.*, 21. If such was held to be law when the whole

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consideration was a void contract as against natural persons, why should we not hold now that the money borrowed is a good consideration to support a promise to pay it back with the legal interest thereon? We can see no distinction between the two cases. There, as here, the contract relied upon to support the new promise was absolutely void; but it was moral and equitable to pay all that was legal, nay, it would be unjust not to pay it. So here the usurious contract is void against the bank, but it is right for the borrower to pay the bank back the money loaned and lawful interest, and a new promise to do so ought to be just as valid and binding in this case as in that. Indeed, in this case, at the time the new promise was made and the notes sued on were given, all usury laws had been abolished, and under precisely similar circumstances in England a majority of the court of exchequer held a new promise to pay the entire debt, principal and all interest, legal and usurious, a valid promise, supported by the morality of paying back the money borrowed: 1 Hurlstone & Coltman, 702. We do not go to that extent, but rather agree with the view presented by the dissenting judge, who held the money borrowed a good consideration to support a promise to pay the principal and legal interest.

3. The plea here is that the consideration is illegal, and therefore that it will not support the two notes sued on; but it is not wholly illegal, we think, but void in part and good in part; and as it is severable, as the usurious part may be purged out, and nothing but the pure money borrowed and the legal interest be left, we think that, under our Code, section 2745, which provides that if the consideration be good in part and void in part, and be severable, it may be sustained for the good part, that these notes may be sustained for principal and lawful interest. In this promise there was nothing illegal, because there was no law against usury when it was made; but this is precisely a case where the consideration was void in part but good in part. The good part, the righteousness of paying back the money borrowed, always was a good consideration to support a promise to pay that money so

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borrowed and the lawful interest thereon. We hold it good for that purpose, and not illegal in any respect, so as to sustain the plea that the whole new contract, made at a time when there was no law at all against usury, was entirely void: See 27 *Georgia Reports*, 571; 41 *Ibid.*, 331. It may be added that courts of equity never would relieve against usury except on the payment of the money borrowed and the legal interest. The fact is, that usury was always regarded as anomalous in character, and never so totally illegal as that the parties could not settle equitably by paying and receiving the principal and lawful interest. As the plea of defendant went to the whole of the two notes sued on, and sought to annul the whole, the money actually borrowed and the lawful interest as well as the usurious interest, we affirm the judgment, but direct that the defendant have leave to amend, if so advised, by pleading inadequacy of consideration as to the usury there may be in the notes sued on, or rather in the consideration on which they were given.

Judgment affirmed, with directions.



C. B. BEAN & COMPANY, plaintiffs in error, *vs.* W. S. HADLEY, defendant in error.

The record contains only the brief of evidence, charge of court, motion for new trial, and order overruling the same. Neither pleadings, verdict nor judgment appear. There is, therefore, nothing here for this court to review, and the writ of error must consequently be dismissed.

**Practice in the Supreme Court. Before Judge HOPKINS.
Fulton Superior Court. October Term, 1875.**

Reported in the decision.

HILLYER & BROTHER, for plaintiffs in error.

Z. D. HARRISON; R. H. CLARK, for defendant.

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WARNER, Chief Justice.

This was a motion made in the court below for a new trial on various grounds, in a case which was assumed to be an action of complaint for land, and on the trial of which, it was assumed the jury had found a verdict for the plaintiff against the defendants. The record contains a brief of evidence, a charge of the court, and a motion for a new trial, and an order overruling the same. On examining the record as it is presented here, there is no déclarátion or other pleadings going to show what was the nature or character of the plaintiff's action in the court below, nor does the record show that there was ever any verdict rendered in favor of the assumed plaintiff against the assumed defendants, or that any judgment had been rendered thereon which this court can review, either for the purpose of reversing or affirming the same.

The plaintiffs in error in their bill of exceptions complain that a certain verdict and judgment was rendered against them in a certain described suit, in which Hadley was plaintiff and C. B. Bean & Company defendants, to recover from the defendants certain real estate described in the declaration which is contained in the record. It was therefore incumbent on the plaintiffs in error to show affirmatively by the record, that such a suit had been instituted and that a verdict and judgment had been rendered against them in that suit.

Inasmuch, therefore, as the record before us does not contain any declaration of any suit for land, in which Hadley is plaintiff and C. B. Bean & Company defendants, and no verdict and judgment thereon which this court can review, either for the purpose of affirming or reversing the same, it is ordered that the writ of error be dismissed.

Moughon *vs.* The State of Georgia.

BOSWELL MOUGHON, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. The opinion of a witness experienced in the use of guns, as to the length of time since a gun was fired off, is admissible evidence in connection with the facts on which it is founded.
2. That the shot found (next day after the shooting) in one barrel of the prisoner's gun, the other being empty, were compared with those which lodged in and about the person assaulted, and were like them, is admissible evidence.
3. That a person other than the prisoner has admitted that he did the shooting in question, is not admissible evidence.
4. It is sufficient that the facts connecting the prisoner with the offense be proved beyond a reasonable doubt, whether by positive or other testimony. It is not a rule of law that there must be no doubt about the facts.
5. Direct and circumstantial evidence are the same in effect when they equally convince the mind; and either kind of evidence is sufficient to establish a fact or to warrant a conclusion. But circumstances may point to a conclusion, and yet be too slight to justify its adoption.
6. The court need not further define circumstantial evidence than by reading to the jury section 3747 of the Code.
7. When an unfriendly interview with the prisoner is proper matter of evidence, his manner during the interview, and that it was unusual, may be proven as part of the *res gestae*.
8. The circumstances of the prisoner's arrest illustrated no issue in the present case; and the testimony of the prosecutor that he had him arrested on suspicion, was not admissible.
9. A proposition which directs the jury to weigh the evidence with caution and deliberation, and not to infer guilt unless it is established beyond a reasonable doubt, is not the equivalent of a previous proposition which states the question to be, whether the circumstances in evidence are sufficient to satisfy the jury beyond a reasonable doubt that the prisoner committed the crime, not whether it is more probable that he committed it than any other person.
10. In giving to the jury as law what has been reduced to writing by counsel in a request to charge, it is not error for the court to add oral comments, where no request is made to give the whole charge in writing, and where the comments added are pertinent and correct.

Criminal law. Evidence. Charge of court. Before Judge WRIGHT. Dougherty Superior Court. April Term, 1876.

Moughon was placed upon trial for the offense of assault with intent to murder, alleged to have been committed upon

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the person of one Hopkins Tillory, on August 10th, 1875. The defendant pleaded not guilty.

The evidence showed that Tillory was shot about eight o'clock at night, whilst lying upon the couch in the passage of his dwelling-house, by some unknown person; that he was struck by some fourteen squirrel shot.

The circumstances which pointed to the defendant as the perpetrator of the crime were, in brief, as follows:

1st. Four or five days before Tillory was shot he saw two negroes pick up a sack of cotton in his field, and run off with it; he fired at one of them and hit him. This person was ascertained to be the brother of the defendant. On the next day, at the gin-house, words passed between Tillory and the defendant in reference to the shooting of the latter's brother, and, according to the testimony of the former, threats were made against his life.

2d. The defendant, when arrested, made conflicting statements as to the whereabouts of his gun.

3d. One barrel of the gun, when found, at eleven o'clock, A. M., on the day after the shooting, appeared to have been recently fired—within the preceding twelve hours.

4th. The shot which lodged in the person of Tillory and in the banisters of his house, corresponded in size with those drawn from the loaded barrel of his gun.

The jury found the defendant guilty. He moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict was contrary to law and evidence.

2d. Because the court erred in admitting the opinion of the witness, J. J. Bush, as to the time which had elapsed since the gun had been discharged, accompanied by the facts upon which he based such opinion, he having also stated that he had been familiar with the use of guns all his life.

3d. Because the court erred in admitting the testimony of James J. Mayo, to the effect that the shot drawn from the loaded barrel of the gun on the day after the shooting, corresponded in size with those found in the person of Tillory

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and in the banisters of his house, the witness having compared them.

4th. Because the court erred in rejecting the testimony of Joe Smith, to the effect that one Frank Knighton had confessed the crime of shooting Tillory.

5th. Because the court erred in refusing to charge, "that in cases of circumstantial evidence, the facts proved to connect the prisoner with the crime, must all be proved by positive testimony; there must be no dispute about the facts."

6th. Because the court erred, when the jury returned and asked to be re-charged as to what circumstantial and positive evidence were, in instructing them as follows, to-wit: "In using the term positive evidence to you on yesterday, I should have used the term 'direct.' Direct and circumstantial evidence are the same, in effect, when they equally convince the mind. Circumstantial evidence, when the circumstances are proven which point to a certain conclusion, is as sufficient to establish a fact as direct evidence, and both kinds of evidence then become of a positive nature."

7th. Because the court erred in not telling the jury what circumstantial evidence was, except by reading section 3747, *et seq.*, of the Code.

8th. Because the court erred in this: after charging each of the three following requests of the defendant, in stating that it had already given this in charge, and now gave it again; and after reading the last of the three requests to the jury, in stating that they contained the same principle of law:

1st. "The question in this case is not whether it is more probable that the defendant committed this crime than any other person, but whether the circumstances given in evidence are sufficient to satisfy the jury, beyond a reasonable doubt, that the prisoner committed the crime?

2d. "It is the duty of the jury to weigh circumstantial evidence with caution and deliberation—to be careful not to draw any inference of the guilt of the defendant from the facts proven, unless such facts, taken and connected together, establish beyond a reasonable doubt the defendant's guilt.

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3d. "If the jury, after examining all the evidence, have a reasonable doubt whether this crime was committed by the defendant, or by some other person, it is the duty of the jury to give the defendant the benefit of that doubt."

The court erred in making any comments whatever on said requests to charge, and also in making the particular comments it did, especially as it, after concluding its general charge, inquired of defendant's counsel if they still desired these requests to charge given, they replying in the affirmative.

9th. Because the court erred in allowing the witness, Hopkins Tillory, to state that he had the defendant arrested on suspicion.

10th. Because the court erred in allowing the solicitor general to ask said witness, what was the manner of defendant, and whether there was anything unusual in such manner, when he, witness, had the interviews with him at the gin-house and in the lane?

This witness had testified in relation to these interviews, as follows: Next morning, at the gin-house, defendant asked witness why in the hell did he kill his brother? Some words passed between them in the gin-house, and as witness went over to breakfast, defendant came out of the fence corner, about seventy-five yards from the gin-house, and rose up with a double barreled gun, and said "I'll be damned if I ain't going to kill you." Defendant walked on with witness about one hundred yards, when the latter turned oft, and at the distance of about five yards defendant said, "I'll get you yet."

In response to the question objected to, the witness answered that defendant's manner was unnatural and indignant; that he appeared to be mad when at the gin-house, and he was in the same condition when in the lane.

The motion was overruled and the defendant excepted.

R. N. ELY; H. MORGAN, by D. H. POPE, for plaintiff in error.

B. B. BOWER, solicitor general, for the state.

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BLECKLEY, Judge.

In trying a case depending upon circumstantial evidence, very few abstract principles should be given to the jury. Left to exercise their common-sense in their own way, the jury will generally determine correctly what is well proved, and what lacks further support. Furnished with a superfluity of rules, their attention is distracted, and the proffered help only obstructs. The better practice is, to decline charging refined speculations, and give only coarse, sharp-cut law. What shall come to the jury as evidence, is for the court. What it is worth when it arrives, is for the jury. They can discern its true value with spare assistance from the bench. The judge may well assume that they have a fair aptitude for their share of the common business.

A part of the charge complained of is, that "circumstantial evidence, when the circumstances are proven that point to a certain conclusion, is as sufficient to establish a fact as direct evidence, and both kinds of evidence then become of a positive nature." If the word *certain* is to be taken in the sense of definite or particular, to point, merely, is not sufficient, unless what is pointed at be favorable to the prisoner. Circumstances pointing to guilt must, in the aggregate, be irreconcilable with innocence, or they will be insufficient to warrant a conviction: 34 *Georgia Reports*, 345. If, however, the word *certain* was used in the sense of fixed, free from doubt, or free from reasonable doubt, and if the jury so understood it, there was no harm done. In either case, we are embarrassed, somewhat, by the closing member of the sentence, that "both kinds of evidence then become of a positive nature." We do not clearly comprehend how evidence without a positive nature ever acquires it; but whether it acquires it or not, may, for aught we know, be immaterial. We suppose that when it becomes strong enough to convince, its having a new nature or retaining the same old one, would not have any tendency to vary its effect. If, as the judge stated, he had already given the three propositions embodied in the request

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to charge, that was a sufficient reason for disregarding the request. He was under no obligation to repeat. Had he simply declined to do so, he would have done right. But he gave all three of the propositions, and then told the jury that they contained the same principle of law—that is, that they meant, legally, the same thing. In this he was mistaken. The first and second propositions are clearly distinguishable; the one stating the question, and the other laying down a precept to be observed in solving it. Even the third is not identical in meaning with either of the others, for it is more restricted—it relates, solely, to the effect of reasonable doubt. As the main charge was oral, there would have been no error in adding oral comments, after giving the written request, if the added matter had been pertinent and correct. But to confound the three propositions, and treat them all as one, was incorrect. In thus defining them, the court's dictionary was at fault. It is for this error, chiefly, that we order a new trial.

Judgment reversed.

VIOLET TURNER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. One of the grand jury named in the bill of indictment, or special presentment, cannot impeach his own finding; therefore the court will not consider his testimony either that there was no bill or presentment before the jury when the witnesses were sworn, or that the oath administered to the witnesses was not that oath which is prescribed by law.
2. Whilst all the charges in the bill of indictment constituting all the ingredients of the crime, must be proven to the satisfaction of the jury, yet the evidence may be circumstantial as well as direct; therefore the charge that the assault was made with a knife as the weapon likely to produce death, was sufficiently proven by showing the wound, and how it was made, and the sensation of the person cut.
3. If there be sufficient evidence to authorize the verdict, and the presiding judge is satisfied therewith, and there is no error of law committed, this court will not interfere.

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Criminal law. Indictment. Grand jury. New trial. Before Judge KIDDOW. Randolph Superior Court. November Term, 1875.

Reported in the opinion.

A. HOOD; B. Y. JOHNSON, for plaintiff in error.

JAMES T. FLEWELLEN, solicitor general, by JOHN T. CLARKE, for the state.

JACKSON, Judge.

The defendant was indicted for the crime of an assault with intent to murder, found guilty, moved for a new trial, failed to get it below, and brings her case here.

1. The first ground in the motion is that the right oath was not administered to the witnesses by the grand jury who found the bill. The only proof of this was by one of the grand jury who found it. It is against public policy to permit him to testify. He must not impeach his own finding and the legality of it. The only evidence to show that the wrong oath was administered to the witnesses, and that the bill of indictment had not been made out when the witnesses were sworn, being that of the grand juror, there was no legal proof of irregularity before the court, and this ground was properly overruled: *Hoye vs. The State*, 39 *Georgia Reports*, 718. It is a mere technicality any way, and did not hurt the defendant.

2. The second ground is that the bill charged that the assault was with a knife, and there was no proof about the knife. We think that the proof was very positive if circumstantial. It felt like a knife when it cut the girl's throat who was assaulted; it left a mark like a knife would have made, and entered the flesh in the way a knife would have done. In the absence of proof to the contrary the jury thought from this evidence that the instrument was a knife, and that it was likely to produce death, and came near doing it. We incline to think that they thought right.

3. The last ground is that the verdict is against the evidence. We think not. The girl assaulted swore that Violet

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did the deed. Violet was seen leaving the spot where it occurred very rapidly, and told a lie about her hurry ; the two had had a difficulty about a bedstead Violet's husband had given to the person assaulted ; Violet pulled back her head and cut her throat with a sharp something—it was about dark, nearly dark—the girl assaulted came quite near being killed, perhaps within a half inch or less, and we think the jury did right, at least that their verdict is supported by the evidence, and as the presiding judge was content with it we decline to interfere.

Judgment affirmed.

**THOMAS MAGUIRE, plaintiff in error, *vs.* ZADOCK C. BAKER
et al., defendants in error.**

1. When land is described in a deed by metes and bounds, evidence is admissible to show that the particular plat in controversy is not included in such description.'
2. Where land is sold by an administrator in separate tracts, and upon the first bid off there is a mill and dam, the purchaser of such tract obtains the right to use such mill and dam to the extent of their capacity, and the adjoining tracts are subject to such servitude.
3. Where a dam, on account of its defective condition, does not back water to the extent of its full capacity, the owner of the mill has the right to build a new dam of the same height, or to repair the old one, without becoming liable for the damages caused by the increased overflow.
4. Possession of land, subject to overflow from the back-water of a mill-dam, for seven years under color of title, without its having been overflowed on account of the defective condition of the dam, will not relieve the land of such servitude, there being no evidence of intention on the part of the owner of the mill to abandon his right to use such dam to its full capacity.
5. Where a request to charge assumes to be matter of fact what is disputed by an opponent, it should be refused.
6. There is sufficient evidence to sustain the verdict.

Evidence. Deeds. Vendor and purchaser. Servitude. Water. Prescription. Charge of Court. New trial. Before Judge HOPKINS. DeKalb Superior Court. September Adjourned Term, 1875.

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Maguire brought two actions of case against Baker and Humphries for damages to land in DeKalb county, located on No Business Creek, caused by the overflow of water thereupon, resulting from a mill-dam on Yellow River. To these suits the defendants pleaded the general issue, title in themselves, and that the plaintiff purchased subject to the servitude of the overflow from the dam. The cases were consolidated and tried together.

The evidence presented the following facts: The land alleged to have been damaged, as well as the mill and mill tract, had been the property of one Zachary Lee. The dam was erected about the year 1838. It was located on Yellow River a short distance below the point where No Business Creek flows into that stream. The damaged land was situated on the creek. After the death of Zachary Lee, in November, 1863, his executor sold the lands of the estate in parcels. The mill and mill tract was first offered, and was bid off by the legatees of testator, and they subsequently sold to defendants. The latter contend, and introduced evidence to that effect, that the purchase of their vendors covered the land claimed to be damaged. The plaintiff bought land at the same sale. He contended, and introduced testimony to that effect, that his purchase and deed covered the damaged land, to-wit: eleven acres situated in DeKalb county, on No Business Creek. It was replied by defendants that his purchase certainly did not cover such eleven acres, and if his deed did, that by collusion between him and the executor, such conveyance was made broader than the sale. The deed to plaintiff, made on the day of the sale, described the land by metes and bounds; that to the vendors of defendants, made three days thereafter, by land lots and general descriptive words.

Voluminous testimony was introduced on both sides as to whether plaintiff purchased the aforesaid eleven acres at the executor's sale at all, as to the cause of the overflow, and as to the damage. Plaintiff endeavored to show that the defendants erected a new dam on Yellow River in 1871, which

was higher than the old one, thus causing the overflow of No Business Creek. Defendants admitted the erection of the new dam, but denied the increased height, and introduced evidence to show that the overflow was caused by the fact that the creek had become choked up by sand and logs, and also by the fact that the new dam backed water more effectually than the old, the latter having been for many years before 1871 in a leaky condition and out of repair. Defendants also introduced evidence to show that plaintiff's land, since 1871, had not been as effectually drained as before that time; that the ditches were not kept clean, etc. Plaintiff showed that he had been in possession of the eleven acres, claiming the same under his deed, from the date of his purchase.

The jury found for the defendants. The plaintiff moved for a new trial upon the following grounds, to-wit:

1st. Because the court erred in allowing the defendant to prove by Edmond Lee and others, that at the executor's sale the plaintiff did not purchase the eleven acres of land, though it was covered by the deed, and also what lands were purchased by the legatees of Zachary Lee, both deeds being in evidence.

2d. Because the court erred in charging the jury that if the plaintiff did not purchase the eleven acres at the sale, and defendants' vendors did, and these facts were known to the plaintiff, then, even though the deed made by the executor to plaintiff covered such tract, yet he could not set up such title against the defendants, for the purpose of sustaining these actions.

3d. Because the court erred in charging as follows: "If Lee owned certain lands upon which he erected a mill, and, by a dam, flowed water upon land above the mill, and he died, and the land was sold in parcels to several persons, the purchasers of the mill-tract, and those holding under them, retained the right to keep up a dam of equal height with that which was upon it at the time of their purchase, and to back water according to the capacity of the dam. If, for want of repairs, or leakage of the dam, or other cause, the dam did

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not gather such a head of water as it might, and thus the back-water was usually less than the height of the dam would warrant, the owner of the mill had the right to build a new dam to the height of the old one, or to repair the old one, and if thus the extent of the back-water was increased, the owner of the mill would not be liable for the damage caused by the overflow."

4th. Because the court erred in refusing to charge as follows: "If it appeared from the evidence that the plaintiff had been, and was still, in the adverse possession of the land which is claimed by him to have been injured, under the deed made to him by the executor of Zachary Lee, for more than seven years prior to the erection of the dam by the defendants, and during that time there had been no overflowing of this land by back-water from their dam, then the defendants have thereby lost any right which they may have had, at the date of their purchase of the mill-tract, to back water over this land according to the capacity of the dam then in existence."

5th. Because the verdict was contrary to the law and the evidence.

The motion was overruled and the plaintiff excepted.

CANDLER & THOMSON, for plaintiff in error.

HILLYER & BROTHER ; L. J. WINN, for defendants.

WARNER, Chief Justice.

The plaintiff brought an action against the defendants to recover damages for overflowing his land by the erection of a mill-dam. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the defendants. The plaintiff made a motion for a new trial on the grounds set forth therein, which was overruled by the court, and the plaintiff excepted. There was a great deal of evidence introduced on both sides, which was conflicting, and the only questions for us to consider are the alleged errors in the rulings of the court.

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1. It is insisted that the court erred in allowing Edmond Lee and others, to testify that the eleven acres of land alleged to have been overflowed were not included in the deed made by the executor of Zachary Lee to the plaintiff, inasmuch as the deed was the highest evidence. The land conveyed in the plaintiff's deed was described by metes and bounds, and the evidence was admissible to show that the land was not included within the boundaries specified in the deed. When land is described by metes and bounds in a deed or deeds, it is not error to allow evidence to be introduced for the purpose of showing that the particular plat or tract of land in dispute between the parties is not covered by, or included within, the boundaries specified in the plaintiff's deed or deeds.

2. If the plaintiff did not in fact purchase the eleven acres of land from the executor of Lee, and afterwards purchased the same from other persons who had purchased it at the executor's sale, with the mill privileges, with knowledge that he had no title under his first purchase, he could not set up his title thus acquired against the other title under which the defendants claimed, and there was no error in the charge of the court in relation to this point in the case.

3. There was no error in the charge of the court as to the height of the new dam, but, on the contrary, that charge was in accordance with the ruling of this court in this same case: See *Baker et al. vs. Maguire*, 53 *Georgia Reports*, 245.

4. There was no error in the refusal of the court to charge, as requested, in relation to the defendants having lost their right to overflow the plaintiff's land to the extent of the height of the original dam, by reason of their not having done so within seven years. There was no evidence of any intention on the part of the defendants, and those under whom they claim, to abandon the right to back the water to the extent of the height of the dam; whilst it may be true that they did not raise the water to the full height of the dam, as they were entitled to do, still the dam was there and being used, which was notice to the plaintiff that the defendants had not

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abandoned the use of it for the purpose for which it was originally erected.

5. Besides, the charge, as requested, assumes that the plaintiff had color of title to the eleven acres of land, whereas it was a disputed question whether the deed from the executor of Zachary Lee to him covered the eleven acres of land in controversy.

6. There is sufficient evidence in the record to sustain the verdict, and we will not disturb it.

Let the judgment of the court below be affirmed.

WILLIAM O. TUGGLE, executor, plaintiff in error, *vs.* THE MAYOR AND COUNCIL OF ATLANTA, defendants in error.

1. The erection of an extensive iron bridge in lieu of a wooden one, on a street, over a wide railroad cut, is an important improvement, beneficial to the public, and justifying the disuse of the street at the point to be bridged, for a length of time discretionary with the municipal authorities, so that their discretion be not grossly abused.
2. The new bridge being one hundred and forty feet in length, sixty feet wide, and costing \$14,000 00, there was no abuse of discretion in allowing the chasm in the street to remain unbridged for four months after the wooden bridge was removed, and in consuming that much time in having the new bridge put in its place.
3. An adjacent property-holder whose rents were diminished twenty-five per cent. during the time the bridge was down, has no cause of action against the city for damages.

Municipal corporations. Roads and bridges. Damages, Before Judge HOPKINS. Fulton Superior Court. October Term, 1875.

James H. Callaway, the testator of plaintiff in error, brought an action for damages against the Mayor and Council of Atlanta, making, in brief, the following case: Plaintiff is the owner of certain stores on Broad street. Within about sixty or seventy feet thereof is a railroad cut, across which was formerly a wooden bridge, forming a part of the street. On August 12th, 1873,

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the city council entered into an agreement with the Wrought Iron Bridge Company of Canton, Ohio, by which the latter was to replace said wooden bridge with an iron one of the following description : Length one hundred and forty feet, width sixty feet, cost \$14,000 00 ; the work to be completed by December 1st, 1873. (A copy of the agreement, bond, etc., was attached to the declaration.) Early in November defendant had the wooden bridge torn down. The materials for the new structure did not arrive until March, 1874, and during the period of this unreasonable delay the street remained impassable. Plaintiff's tenants notified him that their business was damaged by such delay, and that they would not remain unless plaintiff reduced their rents, which he was compelled to do to the extent of twenty-five per cent. thereof. On February 27th, 1874, he presented a petition to the defendant, reciting these facts, and asking that he be reimbursed the amount of rent he had lost by such delay. This petition the defendant refused to consider, thereby causing him the expense of employing counsel and seeking his legal remedy.

Defendant demurred to the above declaration. The demurrer was sustained, and the plaintiff excepted.

JULIUS L. BROWN; A. W. HAMMOND & SON, for plaintiff in error.

W. T. NEWMAN, for defendant.

BLECKLEY, Judge.

This action seems to us to be founded on a misconception of the character and functions of municipal government. It ignores the mayor and council as agents of thought and treats them as agents of work only. It virtually denies them power to plan and manage, and grants but the power to execute. It seeks to set up courts and juries as their overseers, and to make the mode, if not the time, of effecting public improvements conform to opinion in the jury box, rather than to opinion in the council chamber. Whether a bridge of iron shall

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be substituted for a bridge of wood is discretionary with the mayor and council. When and in what manner it shall be done, (so that no unlawful means be used) are alike discretionary. For the sake of a great, permanent improvement, such as an iron bridge, it is not unlawful to withdraw temporarily from use the part of the street where it is to be erected. Such a measure may, in the judgment of the mayor and council, be expedient as one of the means to accomplish the work most cheaply and expeditiously. How the public shall be excluded, whether by nailing up the old bridge or removing it, is as much a question of discretion as any other involved in the proceeding. And of the same nature is the further question of how long the exclusion shall operate? Is it for the interest of the city, considering the state of its finances, the labor and materials at command, the location and business of the street, and all else that should be taken into account, for the work to proceed with more or less dispatch? Who, besides the official guardians of the city, can decide? These officials are the people's agents, and if they abuse their trust the people will generally apply the corrective at the ballot-box. If the official discretion be grossly abused, and an individual citizen be specially damaged thereby, he would doubtless be entitled to his action for redress. But here there is no gross abuse of discretion alleged, and none is apparent on the face of the declaration. The averment that the bridge was kept down an unreasonable length of time, is not sufficient without setting out the facts on which the mayor and council exercised their discretion, so that the court may see that there was wantonness or gross folly in taking down the old bridge so early, or in not supplying its place sooner with the new bridge, or with some temporary structure. The declaration proceeds upon the theory that it was the duty of the authorities to go on with the work as expeditiously as they could. On the contrary, it was their duty to go on with it as expeditiously as they, in the exercise of a reasonable discretion, *thought* they could. A prudent proprietor will not always erect a building, however much needed, in the shortest

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time he can. He is faithful to his own interest when he makes the utmost expedition that he deems compatible with his circumstances. The guardians of a city have as much latitude in the conduct of municipal improvements, legitimately undertaken, as prudent persons ought to allow themselves in the management of their own affairs. It is a mistake to suppose that a citizen can present a balance-sheet at the city treasury, and get his losses cashed whenever the improvements in his neighborhood do not go forward as rapidly as they might, or in the best possible manner. It is not unlikely that property like the plaintiff's, in the immediate vicinity of this iron bridge, will be permanently benefited by its erection very much more than property more remote from it on the same street, or on other streets in the city. From wood to iron in public bridges is great progress. The four months consumed in making the change may suffice for a century. Interruptions in the use of the street for repairs or renewals of the wooden bridge might have amounted to much more than that in the fourth of a century, even with the utmost care, and economy of time. People must submit to some temporary inconvenience for the sake of great works that are to stand as future monuments of the enterprise and public spirit of the age. In no other way can the world advance. It is quite too contracted a view of this case to attempt to govern it by the law of nuisance.

Judgment affirmed.

ROBERTS, DUNLAP & COMPANY, plaintiffs in error, *vs.* JAMES S. GRAYBILL, defendant in error.

1. If a case turn entirely on the question whether plaintiff or one of the defendants is to be believed, and if the jury believe the plaintiff, and if his version of the transaction sustain the legality and equity of the verdict, as well as the sufficiency of the evidence to support the verdict, this court will not control the discretion of the presiding judge in refusing a new trial on those grounds.

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2. If defendant's theory of the case be true, that the transaction was a bailment and not a loan, and that the plaintiff agreed that if confederate money which he collected proved valueless at the end of the war, then the loss should be plaintiff's, it is not necessary that defendant should tender the money after the war closed; it is enough that he prove, in any way, that the money died on his hands; therefore a charge that a tender, after the war, had nothing to do with the case did not hurt the defendant, the charge being right in other respects.
3. A contract, whether for the loan or bailment of confederate currency, made on the 24th of December, 1864, is within the ordinance of 1865, authorizing the jury to settle equities between the parties, growing out of confederate contracts, and the charge that the case is within the ordinance, is right.
4. The charge that if the jury found for the plaintiff, they should be governed by Barber's tables, to be found in *34 Georgia Reports*, in estimating the amount due him in currency, did not hurt the defendants, said tables being in evidence without objection.
5. A new trial will not be granted on newly discovered evidence which pertains entirely to an agreement of counsel, not in writing, and which the original counsel of defendants neglected to communicate to his successors, and which they neglected to ascertain when he went upon the bench.

Evidence. Confederate money. Tender. Contracts. Charge of Court. New trial. Before Judge BARTLETT. Bibb Superior Court. October Term, 1875.

Reported in the opinion.

HILL & HARRIS, for plaintiffs in error.

T. J. SIMMONS; A. O. BACON, for defendant.

JACKSON, Judge.

Graybill brought an action of assumpsit founded upon a receipt which was as follows:

"Received from James S. Graybill three sight drafts, given by W. L. High, agent, for \$20,000 00 each, making \$60,000 00, signed by W. L. High, agent, to A. A. Bell, Augusta, Georgia. The drafts received for collection or return protested, and indorsed by James S. Graybill."

The petition alleged that Roberts, Dunlap & Company did collect the said sum of \$60,000 00, and did convert the same to their own use, and thereby became liable to pay

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said sum to the plaintiff; and in consideration of such liability undertook and promised to pay said \$60,000 00 to the plaintiff, which, though requested, they had failed to do. The receipt was dated the 24th of December, 1864, and the collection, and conversion and promise to pay, were alleged to have occurred on the first of January, 1865. To this declaration the defendants pleaded the general issue; *non est factum* in this, that the instrument or receipt had a condition in it that the sum was collectible in Confederate treasury notes, which had been torn off, and that the promise was to pay in Confederate money, and not otherwise, and that on the 6th of May, 1865, the defendants tendered the plaintiff the sum due in Confederate notes, which was refused; which last plea was afterwards amended by setting out that they collected the money in January, 1865, in Confederate currency, and about the first of February thereafter offered to pay him, but he refused it, and requested them to hold it, giving them the right to use it as they pleased, and that they again tendered it on the said 6th of May, and plaintiff again refused to receive it, and it became worthless on defendants' hands. On this pleading plaintiff introduced the receipt, and testified that the receipt was correct and nothing had been torn off it, and that it had been altered in no particular whatever; that Roberts, on the 24th of December, 1864, came to him and inquired if he did not have money in Augusta; he replied he had the three drafts on Bell; that Roberts said that he would like to have it as he wanted to buy goods in Augusta, and he told Roberts that it was worth something to collect the funds in Augusta, and he would let him have the \$60,000 00 at seyen per cent. for one, two or three months. At the expiration of the time, three months, he thinks, he called at his store and wished to know if Roberts wanted the money longer; Roberts said he did, and would pay more than seven per cent. for it. Afterwards called on Roberts for \$2,500 00, but he could only pay \$1,500 00; he had used the balance. Afterwards, he called on him for \$50,000 00, telling Roberts that he could lend it at \$1,000 00 a month to a good merchant in Macon. Roberts

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said he could pay as much as anybody, and wanted to keep the money; plaintiff then told him that he could keep it. The drafts were never returned protested, and it was never denied that the money was collected by defendants. Some ten days or two weeks after the Confederacy had gone up, and Wilson was in possession of Macon, Roberts tendered him what he said was \$60,000 00, which he had in a package; witness refused to take it.

Roberts, on the other hand, swore that the receipt was not a true copy, and that it had been altered by tearing off a copy of one of the drafts, which was at the top of the receipt, and expressed to be payable in Confederate treasury notes; that he went to Graybill, having learned that he had money to loan; Graybill said he had none, but he had three sight drafts on Augusta for \$20,000 00 each; that they took them to collect, and as Graybill was doubtful about their collection, he agreed that we should have the money for three or four months, without interest, in consideration that we charged nothing for collecting it; that no interest was to be paid, and the money was to be returned in Confederate currency. The money was collected in January, and Graybill was notified, and at various times between January and April, 1865, he was told that the money was ready for him; he said he did not want it, and that whenever he did he would call for it, and take it in Confederate notes. Witness warned him repeatedly that the war would end, and Confederate money might go up; he said if it did it would be his loss. Such was the contract, and he took the risk. About the 27th of March he called late in the evening to get \$3,000 00. Witness told him he did not know that he had that much in the store, but let him have \$1,500 00, which he said would do until morning, and in the morning he said he wanted no more; afterwards he said he wanted \$2,500 00 to loan in Macon. Witness told him he could have it, but he changed his mind as it would not be safe; witness then told him that he had the money and was ready to pay it, but unless he wanted it witness would use it in their business. He said he didn't want it, and witness sent the money down to Bain-

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bridge and Thomasville for investment, and it has been returned, and witness has on hand the original money—it was never invested. The money was again tendered to plaintiff in May, 1865, and he declined to receive it. On cross-examination, Roberts said that he did not remember whether he got the money tendered in May from John Curd or not; he had no recollection of it; that the money that he had sent to Bainbridge and Thomasville had not then been returned.

Graybill, in rebuttal, swore that he never agreed in the contract that if Confederate money became worthless by the ending of the war, that the loss should be his.

The jury found for the plaintiff \$1,459 69, principal, and interest, payable in currency. The defendants moved for a new trial, because the verdict was contrary to law, to the principles of justice and equity, against the weight of the evidence and without evidence to support it. Because the court ruled that a tender made after the fall of the Confederacy had nothing to do with the case, and excluded the evidence of Jones to that effect. Because the verdict of the jury was contrary to the charge of the court, as follows: "If the jury believe from the evidence that the drafts were expressed to be payable in confederate currency, and the full amount of the debt at any time afterwards was unconditionally tendered to the plaintiff in Confederate money, this is a good tender." Because the court charged that this case falls under the ordinance of 1865, and because the court further charged that Barber's tables show the value in gold, and the jury will therefore ascertain the value of Confederate money at the time they shall fix upon, and so find, if their verdict shall be for the plaintiff. Another ground for a new trial was newly discovered evidence, which consisted of a deposition of Judge B. Hill, to the effect that he was the original counsel for the defendants, filed the plea of *non est factum*, and after filing it he had an interview with Judge Locrane, who admitted the facts stated in the plea were correct, and showed deponent the copy draft that had been severed from the receipt, and admitted that the draft and receipt were one and the same paper, and should be regarded as

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one and produced together at the proper time; that deponent therefore took no steps to have the missing papers produced, and never informed Hill & Harris, nor any of the defendants of these facts, relying upon the agreement and supposing it would be carried out.

The court overruled the motion for a new trial, and defendants excepted.

1. In respect to the first grounds taken in the motion that the verdict is against the law, justice and equity, and the weight of the evidence, it is enough to say that if the plaintiff told the truth in his testimony the verdict is sustained abundantly by law, justice, and the evidence. The jury found that the plaintiff did tell the truth. The question for them was whether the plaintiff told it, or the defendant, Roberts; they had a right to believe the plaintiff; it was purely a question for them, and it is not for us to interfere and thus to take upon ourselves to say that Roberts was to be believed and that Graybill was not to be believed. The court below was satisfied with the finding, and this court has held so often that in such cases it will not interfere that it is unnecessary to reiterate the old story.

2. But in this case it is said that the court erred in holding that a tender made after the fall of the Confederacy, and when both parties knew that the Confederate currency tendered was utterly worthless, had nothing to do with the case. We cannot see why the tender should have been made. If plaintiff's account of the trade was correct, the tender was too late; it was utterly valueless, and no legal tender under the ordinance of 1865 or otherwise. If defendant's theory was right, then the tender was useless; all he had to do was to show that the money died on his hands; for, according to his theory, the plaintiff assumed all risk, and if the money became valueless, it was to be plaintiff's loss. There would be no sense in tendering a dead pawn or bailment—to prove its death on the trial would answer every purpose. To show the dead body, then, on the trial, would be but to show more conclusively that it had died; and if before, it had been tendered after

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death a hundred times, it would not strengthen the proof of its worthlessness. We do not think that the verdict was contrary to the charge of the court in respect to tender.

3, 4. But it is said that the court erred in charging that the case fell within the ordinance of 1865. We think that it did fall within it. That ordinance was to settle equities between parties which grew out of contracts made during the war. This was made during the war. If it was to be paid for as a loan, according to plaintiff's version, it fell within the ordinance; if returned after the war as a bailment, it fell within the ordinance. In the first case, the equity was to scale it to its value in greenbacks; in the second case, it was to find for defendant. The court did not tell the jury to find either way, but simply to do equity, under the ordinance, which gave them full power to do right. If they found for the plaintiff, the court told them to be governed by Barber's tables, which were in evidence without objection. The jury found for the plaintiff in currency instead of gold, so that if this charge hurt anybody it hurt the plaintiff.

5. We think there is nothing on which we can grant a new trial in the newly discovered testimony. The agreement was between counsel and was not in writing. Besides, Judge Hill should have told his successors about the agreement, and they should have inquired all about their case of the original counsel who had gone on the bench. There was want of diligence all around. On the whole, we see no error of the court disclosed to us in this record which would authorize our interference, and the verdict is fully sustained by Graybill's testimony. If Mr. Roberts has been wronged, it seems to have grown out of the fact that his neighbors, the jury, believed the version of the plaintiff rather than that which he, Roberts, gave of the transaction.

Judgment affirmed.

Coleman *vs.* Worrill *et al.*

WILLIAM E. COLEMAN, trustee, plaintiff in error, *vs.* AMOS WORRILL *et al.*, defendants in error.

Complainant's bill, filed July 28th, 1873, alleged that he held a mortgage made by one Walker, in 1859, to secure the payment of a note due December 25th, 1860; that at the November term, 1869, of Upson superior court, a rule *nisi* to foreclose was sued out by complainant, but by inadvertence was not served upon the administrator of Walker, who had died in the meantime; that an order was granted at November term, 1870, extending the time of service, and requiring defendant to show cause at the next May term; that this was served on February 1st, 1871; and that defendant had advertised and sold the property on the first Tuesday in February, 1870, complainant having no notice thereof. The prayer was that the mortgage be foreclosed, the sale set aside and the deed canceled, or, in default of this, that the purchase money should be applied to the mortgage:

Held, that a demurrer to the bill should have been sustained, both for want of equity and because it was barred by the statute of limitations.

Equity. Mortgage. Statute of limitations. Before Judge WRIGHT. Upson Superior Court. November Adjourned Term, 1875.

Reported in the decision.

SPEER & STEWART; M. H. SANDWICH; E. P. HOWELL, for plaintiff in error.

W. A. HAWKINS; E. W. BECK; J. A. COTTEN, for defendants.

WARNER, Chief Justice.

The complainant filed his bill against the defendants in the superior court of Upson county, on the 28th of July, 1873, in which he alleged that he held a mortgage executed by one Benjamin Walker, in his lifetime, on certain described lands in said county, to secure the payment of a promissory note therein mentioned, dated 29th December, 1859, and due 25th of December, 1860, said mortgage bearing date 29th of December, 1859; that Walker died, but the time of his death is not alleged, and that Worrill became his administrator;

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that at the November term, 1869, of Upson superior court, complainant filed his petition for a rule *nisi* to foreclose said mortgage, which was granted, but by some mistake or inadvertence, Worrill, the administrator of Walker, was not served with a copy of said rule *nisi*, but that at the November term of the court, 1870, an order was granted extending the time for service of said rule *nisi* on said Worrill, administrator, and requiring him to show cause, etc., at the next following May term of the court, and which was served on him on the 1st of February, 1871. Complainant also alleges that Worrill, as administrator, after advertising a portion of the lands included in said mortgage, sold the same at administrator's sale as the property of his intestate, on the first Tuesday in February, 1870, when the defendant, Wilmot, became the purchaser thereof, he being the highest and best bidder; that complainant had no notice of said sale, did not see the advertisement, etc.; that if said sale shall be held valid the further attempt to foreclose his mortgage will be ineffectual, and if invalid, said administrator's sale will be a cloud upon the title of the mortgaged property so that a fair price cannot be obtained for it. Wherefore complainant prayed that Worrill, as administrator, might be decreed to bring into court the purchase money received from the sale of the land, to be applied to the payment of the mortgage debt, if said sale should be held to be valid, but in the event said sale should be held to be invalid, that the same may be set aside and the title papers canceled; and that his said bill may be held and considered as ancillary to said rule for foreclosure, and that both may be tried together.

It appears from the record, that the defendants, at the return term of the bill, filed a demurrer thereto for want of equity, and on the ground that the complainant's claim was barred by the statute of limitations; whereupon the complainant amended his bill by alleging that Beall, the attorney of Worrill, administrator, who was duly employed by him and authorized to make such acknowledgment, did acknowledge service on said rule *nisi* and waive a copy thereof; but it is

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not alleged at what time said acknowledgment was made, nor does any such acknowledgment appear on the rule *nisi* attached to the complainant's bill as an exhibit. It further appears from the record before us that at the May term of the court, 1875, the demurrer was heard and overruled, when the defendants tendered their bill of exceptions, which was duly certified and entered of record, as provided by the 4250th section of the Code, and error was assigned thereon by the defendants.

When the case was called for a final hearing thereof, the defendants made a motion, *ore tenus*, to dismiss the complainant's bill for want of equity, which motion the court sustained, and the complainant excepted.

What is the character and object of the complainant's bill when stripped of its unnecessary verbiage and reduced to its simple elements? It is an attempt to transfer an application for the foreclosure of a mortgage from a common law court, in which it was originally commenced according to the complainant's theory, to a court of equity, for foreclosure. In our judgment the court erred in overruling the defendants' original demurrer to the complainant's bill, which is now assigned for error here. There is no allegation that the sale of the land made by the administrator of Walker was not made according to law. If the service was acknowledged by Beall on the rule *nisi*, as alleged in the amended bill, that fact could as well have been proved in the common law court as in a court of equity. But the complainant's cause of action accrued prior to the 1st of June, 1865, and was therefore barred by the statute of limitations of 1869. It is true the complainant filed his rule *nisi* to foreclose his mortgage in November, 1869, but it was not served until the 1st of February, 1871. Beall was not such a *special* attorney of the mortgagor as is contemplated by the statute on whom service could have been legally perfected, even if his acknowledgment of service had appeared on the rule *nisi*, which it does not. There was no suit, therefore, in this case which would take it out of the operation of the act of 1869, according to

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the previous rulings of this court: See *George vs. Gardner*, 49 *Georgia Reports*, 441; *Ferguson vs. Manchester Manufacturing Company*, 51 *Ibid.*, 609. Inasmuch as no decree could have been made against the defendants on the allegations contained in the complainant's bill, and the court having erred in overruling the original demurrer thereto as contained in the record, there was no error in dismissing it at the hearing.

Let the judgment of the court below be affirmed.

JOHN B. LEWIS, plaintiff in error, *vs.* **JAMES M. ARMSTRONG**, administrator, *et al.*, defendants in error.

The general countenance of a case, taken as a whole, may justify the grant of a new trial, though no one feature be especially defective or distorted. The discretion of the presiding judge in granting a first new trial is very ample.

New trial. Before Judge CLARK. Cumber Superior Court.
October Adjourned Term, 1875.

Report unnecessary.

W. A. HAWKINS; S. HALL, for plaintiff in error.

D. A. VASON; JOSEPH ARMSTRONG; N. A. SMITH, for defendants.

BLECKLEY, Judge.

The motion for new trial embraced several grounds—error in the charge, error in refusing to charge, conflict of the verdict with the evidence and with the charge of the court, providential absence of one of the attorneys of the plaintiff in error from the trial on account of sickness, he being both leading counsel and a material witness. The court granted the motion generally, discerning in the case as a whole, no doubt,

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good reason for ordering a new trial. We are well satisfied with this result, and do not care to scrutinize, separately, the several grounds of the motion. If we were clear that no one of them, taken alone, should be held sufficient, we would not interfere, for the general presentation of all of them together is decisive. There should be no hesitation in conceding to the presiding judge very ample discretion in granting a first new trial.

Judgment affirmed.

JOHN L. GILBERT, plaintiff in error, *vs.* WILLIAM A. CHERRY, defendant in error.

1. In a suit for damages for breach of an agreement to buy lands and pay for the open lands all the oats that could be raised thereon in 1874—the purchaser to sow, harvest and deliver them to the seller—the seller should not be permitted to testify to the jury that if the purchaser had complied with his contract, “I would have gotten for my land \$25,000 00, could not sell it now for \$15,000 00, and lost \$10,000 00 by Gilbert’s not complying with his contract.” He might, after stating the facts on which his opinion was based, such as his experience in oat cropping, his acquaintance with this land and the cultivation thereof in oats, have given his opinion of how much oats the open land would have produced in bulk, how much per acre, how much, a good oat year, or an indifferent or a bad one, what sort of year 1874 was for oats, how much open land there was on his place, and what the price of oats was in 1874; and then the jury should have been left to estimate the damage from the facts on which he relied and which he detailed before them.
2. In such a suit, it is also error to permit the plaintiff to testify that he could have cleared \$600 00 over and above expenses, in cutting and hauling wood from the land, if he had not been prevented from hauling by said contract.
3. In such a suit, when plaintiff had been permitted to testify that defendant was well acquainted with the lands sold, it was error in the court not to allow defendant to contradict such testimony, on the ground that the testimony was irrelevant, and still to refuse to strike it and rule it out as irrelevant on the motion of defendant, because he had not objected to it when offered; the effect of which was to suffer the testimony to remain as evidence before the jury, and yet not to allow it to be contradicted by other evidence. It should have been either altogether withdrawn from the jury, or the defendant should have been permitted to explain or contradict it.

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4. Whilst it is true that when both the parties have equal opportunity to examine the lands bargained for, a court of equity will not relieve the purchaser on account of a misrepresentation of the seller of facts which were open to inspection, yet when a promisor to buy alleges in his equitable plea against the seller's suit for damages for breach of his written agreement to buy, that he signed the agreement hurriedly and without an examination of the land, and was induced to do so by a false and fraudulent promise of the seller to go over the land with him before a consummation of the trade by delivery of the possession of the land, and show him all of it, that one-half of the eight hundred acres was open land and fit for cultivation, and the woodland was well-timbered for rails, and that he would find it all just as he had represented it, and afterwards repeatedly promised that if he did not so find it, then the writing should be considered null and void, and that the seller utterly failed and refused to go over the land and point it out to him, and when he went himself alone, as he was forced to do by the false promise of the seller, he found the said representations untrue in respect to the rail timber, the open land, and its fitness for cultivation in oats, without great expense:

Held, that the allegations of fraud in procuring the promisor's signature to the agreement set out in the plea, are sufficient to make a case for equitable relief, and the equitable plea to that effect should not have been stricken on demurrer.

5. When the contract of sale was to the effect, that Cherry agreed to sell to Gilbert about eight hundred acres of land, part wood and part open, on the terms that Gilbert should sow the open lands in oats, and harvest them, and deliver them in Macon to Cherry, in consideration of which Cherry agreed to convey to Gilbert good title for the open land so cultivated, "and also for all the balance of the eight hundred acres, provided Gilbert paid him for each acre thereof the market value of the oats made on each acre of the land so cultivated, that is to say, the value of the oats so raised on an average acre of said land so sown in oats, is to be the price said Gilbert is to pay per acre for said remainder of said land; and if said Gilbert does not agree to give that price so ascertained for said land, then he has the option of sowing said land in oats for the next ensuing year, and to pay the value of said remainder of said land, ascertained as aforesaid, in the oats to be so raised and grown in the second crop year, the first crop year ending in the spring of 1874;" title in fee simple to all the lands to be made by Cherry to Gilbert on his compliance with the above, the value of the oats to be the market value thereof in Macon, the actual number of acres to be ascertained thereafter, the open lands agreed to be sown in oats to be such as "can be reasonably prepared and put in oats, in the judgment of said Gilbert," and when this contract was dated the 4th of July, 1873, and it did not appear in the writing when the land was to be delivered to Gilbert, except inferentially, in time to sow the oats, and when it appeared from parol testimony that the lands were rented and could not be delivered until the growing crop was gathered:

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Held 1st. That a plea alleging, in effect, that the scrivener who drew the writing had, either by mistake or by the fraud of Cherry, said scrivener being the counsel and attorney of the said Cherry, failed to set out the true contract clearly in the written agreement, which contract was to give Gilbert the option of paying for all the balance of the land, other than that sown in oats the first year, in oats raised upon the same land the second year, so as to make two crops of oats on the open land the entire price of the whole eight hundred acres, if Gilbert preferred it; and praying that the writing be reformed and corrected so as to be made to speak the true contract, is a plea which contains substantial grounds for equitable relief, and should not have been stricken.

Held 2d. That a plea alleging, in effect, that the land bargained was encumbered by a large mortgage, not known at the time he signed the written agreement to defendant, for money borrowed by the plaintiff, which mortgage is still unpaid, and that plaintiff, Cherry, had deceived Gilbert, the defendant, by inducing him to believe, at the time he signed the agreement, that the land was free from encumbrance and that he could make good fee simple title thereto, and that plaintiff was then and is still greatly embarrassed and suits for large sums are pending against him in both the federal and state courts, and that Cherry could not have made Gilbert good title to the land, if Gilbert had taken possession thereof, and sowed, reaped and delivered the oats, is also a plea which contains substantial grounds for equitable relief, and should not have been stricken.

Held 3d. That the entire contract is not an actual sale of the land, consummated by the delivery of possession and executed either by deed or bond for titles, but an agreement to sell in consideration of certain things to be done by the vendee in the future, involving, necessarily, risk and expense on his part, which he was to incur as a condition precedent to the acquisition of any title to any part of the lands agreed to be sold, uncertain and speculative in character and consideration, unusual and ambiguous in stipulations and terms, and eminently proper to be explained by parol evidence of surrounding circumstances in respect to the true intention of the parties; and any misrepresentation or concealment of one party, or failure to do what was agreed to be done if the other would sign the agreement, should be closely scanned by a court of equity, and if the facts proved fraud or deceit, in the opinion of the jury, in the procurement of the signature to the writing, it should be set aside as wholly null and void, or reformed so as to speak the true contract agreed upon.

Held 4th. That if the jury should believe that defendant, without sufficient cause, arising from the misrepresentation, or concealment, or fraud of the plaintiff, failed to perform his part of the contract, then neither the failure to rent the land, nor the speculative profits thereof, nor of "the wood crop" which might have been cleared thereon, should enter into the measure of damages for his breach of the contract; but the true measure thereof for the failure to buy, would be the difference between the value of the land at the price agreed upon, to be ascertained from the true intent and mean-

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ing of the written agreement to buy, and the depreciated value at the time that the contract to buy was broken, and notice thereof given to the seller, so that the seller could have sold to another.

Contracts. Vendor and purchaser. Fraud. Equity. Practice in the superior court. Damages. Before Judge HILL. Bibb Superior Court. October Adjourned Term, 1875.

The following, taken in connection with the above headnotes, sufficiently reports this case:

Cherry brought case against Gilbert for failure to comply with the following written contract:

"GEORGIA—BIBB COUNTY."

"The undersigned have this day entered into the following agreement: William A. Cherry agrees to sell J. L. Gilbert his plantation, consisting of about eight hundred acres, part in woods and part in open land, situate in Bibb county, between one and four miles from Macon, and being lands bought by said Cherry from the estate of Job Taylor, Robert B. Washington, John Boston, M. E. Rylander, Asa Holt, M. S. Thomson, A. Dutenhoffer, known as swamp or river land on the following terms: Mr. Gilbert is to sow all the open lands mentioned in oats, at the usual time of sowing among farmers, and to take the usual pains to make a crop, and when the crop of oats is made the said Gilbert is to have them harvested at the usual harvest time of harvesting oats, and to bale and deliver the same, at his expense, to said Cherry, in the city of Macon; in consideration of which the said Cherry agrees to convey to said Gilbert good titles to and for the part of the land which was so cultivated, and also for all the balance of the said eight hundred acres, provided said Gilbert pays him for each acre of the said balance of the said land the market value of the oats made on each acre of the land so cultivated, that is to say, the value of the oats so raised on an average acre of said land so sown in oats is to be the price said Gilbert is to pay per acre for said remainder of said land; and if said Gilbert does not agree to give that price so ascertained for said land, then he has the option of sowing said land in oats for the next

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ensuing year, and to pay the value of said remainder of said land as ascertained as aforesaid in the oats to be so raised and grown in the second crop year, the first crop year ending in the spring of 1874. Upon the reasonable compliance with all these stipulations the said Cherry is to execute to said Gilbert or his assigns title in fee simple to and for all of said lands. The value of the said crop of oats is to be the market value thereof when duly delivered by said Gilbert to said Cherry, after they are harvested as above provided. The said lands are supposed to be about eight hundred acres, but the actual number of acres can hereafter be ascertained. The open lands herein agreed to be sown in oats are such as can be reasonably prepared and put in oats in the judgment of said Gilbert.

"Witness our hands and seals, this 4th day of July, A. D.,
1873. (Signed) "W. A. CHERRY,
 "JOHN L. GILBERT.

"R. S. LANIER, *Notary Public.*"

The defendant, besides the general issue, filed a number of equitable pleas, which were substantially as follows: 1st. Fraud on the part of plaintiff in procuring defendant's signature to the above agreement. 2d. That said agreement, either through fraud or mistake on the part of the scrivener, did not properly express the contract which the parties thereto intended to make. 3d. Failure of consideration, in that the land in controversy was heavily mortgaged, and plaintiff could not give fee simple title thereto.

On motion of plaintiff's counsel all of these equitable pleas were stricken.

The jury found for the plaintiff \$2,250 00. Defendant moved for a new trial on the following among other grounds:

1st. Because the court erred in allowing plaintiff (over defendant's objection) to testify that if the contract had been consummated he would have received \$25,000 00 for the land, that it was not now worth \$15,000 00, and he had therefore lost \$10,000 00 by defendant's non-compliance with said contract; and further, that he could have made \$600 00 by

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hauling wood from the land, had he not been debarred from so doing by the agreement.

2d. Because the court erred in striking defendant's pleas.

3d. Because the court refused either to admit defendant's testimony to contradict a statement made by plaintiff that defendant was well acquainted with the land, or to strike such statement from the evidence, ruling that both were irrelevant, but the objection to plaintiff's statement was too late after its admission in evidence.

4th. Because the court refused to allow defendant to testify as to the circumstances under which the written agreement was signed, holding that there was no ambiguity therein, and parol evidence was inadmissible to vary its meaning.

5th. Because the court charged that the jury might find an aggregate of damages resulting from the depreciation in price of the land, the loss of opportunity to rent it or use it advantageously, and damage to "the wood crop," provided each of these was shown from the evidence.

The motion was overruled, and defendant excepted.

R. W. JEMISON; RUTHERFORD & RUTHERFORD, for plaintiff in error.

LANIER & ANDERSON, HILL & HARRIS, for defendant.

JACKSON, Judge.

The facts of this case and the ruling of the court thereon, are sufficiently expressed in the head-notes to be understood, if the reporter will append the full written contract and the pleadings; and further elaboration is deemed unnecessary.

Judgment reversed.

Hill *vs.* Waldrop.

NANCY HILL, plaintiff in error, *vs.* MILTON WALDROP, defendant in error.

A widow claimed certain land levied on under a judgment against her husband prior to his death, and sought to set up title thereto by prescription, under a deed made to her by a third party during her husband's life:

Held, that to claim under such title she must show that her possession was adverse to that of her husband.

**Husband and wife. Prescription. Before Judge HALL.
Rockdale Superior Court. April Term, 1876.**

Reported in the decision.

L. J. WINN; J. C. BERRY, for plaintiff in error.

J. J. FLOYD, for defendant.

WARNER, Chief Justice.

This was a claim case, upon the trial of which the jury, under the charge of the court, found the property subject to the execution levied thereon. A motion was made for a new trial, on the several grounds therein set forth, which was overruled by the court, and the claimant excepted.

It appears from the evidence in the record, that the land in controversy was levied on to satisfy a justice's court *f. fa.*, issued on a judgment dated 4th of March, 1863, against A. Scott and Samuel Hill, the defendants therein. The levy was made on the land the 2d of November, 1875, as the property of Hill, and claimed by his widow, Nancy Hill. The plaintiff proved that the defendant, Hill, lived on the land several years before the war and up to the time of his death, and was living on it in November, 1865, but died three or four years ago; that the claimant was his wife, and lived on the land with him, and has continued to live on it since his death up to the time of trial; that Hill cultivated the place while he lived on it, cleared some of the land since and before the war, and used it in every way as a man would his own; that since his death the claimant has lived on the land, cultivated and

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controlled it. The claimant offered in evidence a deed from A. Scott to the claimant, who was his daughter, dated 16th of February, 1866, conveying the land to her as the wife of Samuel Hill, "exempt from the marital rights of said Samuel Hill, for her separate use."

The claimant insists that she has a good prescriptive title to the land under the 2683d section of the Code, and is entitled to be protected against the plaintiff's judgment lien on it as the property of her late husband, Samuel Hill. To enable the claimant to protect her possession under her deed as a prescriptive title, it was incumbent on her to show that she had been in possession of the land for seven years from the date thereof *adversely* to the defendant in *fi. fa.*, claiming the possession of the land in her own right, and that her possession was public, continuous, exclusive, uninterrupted, and peaceable, accompanied by a claim of right: Code, sec., 2679. What is the evidence of the defendant's title to the land? The evidence is that for several years prior to the plaintiff's judgment in March, 1873, Hill, the defendant, was in possession of the land; that he continued in possession of it for some years thereafter up to the time of his death, and used it in every way as a man would his own; that the claimant was his wife, and lived on the land with him. The deed from Scott to the claimant is dated in February, 1866. Whether Scott's title to the land, if he had any, was paramount to Hill's, the defendant in *fi. fa.*, does not appear; there is no evidence that he was ever in possession of it at any time, and whilst the claimant could not deny that Scott had a title to the land, the plaintiff in *fi. fa.* might do so. There is no evidence in the record that the claimant, at any time after the date of her deed from Scott, claimed the possession of the land under it *adversely* to the rights of her husband, or that her possession of the land, after the execution of the deed, was in any wise different from what it had theretofore been as the wife of her husband living on the land with him. Hill, the defendant in *fi. fa.*, was in possession of the land, exercising acts of ownership and control over it at the date of claimant's

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deed from Scott to her, and there is no evidence that Hill's possession of the land was any less *exclusive* after the date of that deed than it was before, or that the claimant's possession was any more exclusive or different than it always had been prior to the date of the deed, until the defendant's death, which was long after the date of the plaintiff's judgment. Although the court may have erred in its charge to the jury, still the verdict was right under the evidence, and required by the law applicable thereto, and we will not disturb it.

Let the judgment of the court below be affirmed.

SPENCER C. PRYOR *et al.*, administrators, *et al.*, plaintiffs in error, vs. DOCTOR B. LEONARD, defendant in error.

1. Judgment against administrators which does not provide for collection out of the property of the intestate, is only irregular, not void, and is amendable.
2. That the judgment has been partially paid off, is no reason for not allowing the amendment.
3. On a motion by the plaintiff to amend, the administrators will not be heard to say that they did not have notice of the debt, when it does not appear that there was any failure to serve them with declaration and process.
4. A surety sued in the same action and included in the judgment, cannot prevent the amendment from being made by alleging that the principal was solvent at and after the making and maturity of the debt, and that his risk has been increased by the plaintiff's *laches*. If he is discharged, that is no reason for not correcting a mere irregularity as to his principal; and he could urge his discharge as well with the irregularity corrected as with it uncorrected.
5. The surety cannot, in resistance to the plaintiff's motion to make this amendment, enter into the question of his discharge before judgment by giving notice to sue, or set up an agreement between his counsel and the counsel of the plaintiff, to the effect that the case would not be pressed, and that the counsel of the surety might absent himself from the court, which he did accordingly, leaving the plea of discharge with the plaintiff's counsel.

Judgments. Administrators and executors. Amendment. Principal and security. Before Judge CLARK. Sumter Superior Court. April Term, 1876.

Pryor *et al.* vs. Leonard.

Leonard brought complaint against Pryor and another, as administrators of Benjamin G. Pettie, deceased, principal, and Joseph J. Collier, security, upon a promissory note. Judgment was rendered at the May term, 1867, for the plaintiff, but it omitted to charge the property of the intestate in the hands of the administrators to be administered. At the October term, 1875, the plaintiff sought to cure this irregularity by an amendment. The administrators objected to this proceeding upon the following grounds: 1st. That prior to the date of said judgment, intestate's estate had lands and other property sufficient to satisfy this debt, but that they have paid out all of said property, and now have nothing in their hands belonging to said estate; that they distributed said estate in good faith and without notice of this claim, and they therefore plead *plene administravit*. 2d. That there has been paid to plaintiff's attorney \$700 00 on said judgment, which has not been credited thereon.

The security objected to the proposed amendment upon the following grounds: 1st. That more than three months before action was brought he gave notice in writing to the plaintiff to sue said note, which the latter failed to do; that he pleaded this omission as a defense to this suit before judgment; that when said plea was filed, plaintiff's attorney agreed with this defendant's attorney, one Rogers, that he need not remain in attendance upon the court to defend the case, as he would not press the same, and, relying upon this agreement, Rogers left the court, leaving the plea in the hands of counsel for the plaintiff, to be shown to his client as a reason for not taking judgment against this defendant. 2d. The payment set forth as the second objection of the administrators. 3d. That at the time of the rendition of the aforesaid judgment the estate of the intestate, the principal in the note, was perfectly solvent, but that since then the same has been fully administered and is now insolvent; that this has resulted from the *laches* of the plaintiff in failing to enter judgment against the goods and chattels, lands and tenements of the intestate; that this

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defendant's risk has been thereby increased, and he therefore claims to be discharged.

On demurrer the court dismissed the aforesaid objections, and allowed the amendment asked. To all of which the defendants excepted.

HAWKINS & HAWKINS, for plaintiffs in error.

GUERRY & SON, for defendant.

BLECKLEY, Judge.

1. Here was a mere irregularity. There was no attempt, on this motion, to create a judgment. A judgment already existed against all the defendants, and the omission to make it full enough as to the administrators was amendable: 53 *Georgia Reports*, 387; 54 *Ibid.*, 538. The amendment was warranted by the record. It was needed for conformity. It was, *prima facie*, beneficial to the defendants, and perhaps could have been made without notice to any of them: *Saffold vs. Wade*, 56 *Georgia Reports*, 174.

2. That a partial payment had been made on the judgment, to the plaintiff's attorney, was not a good reason for not making the record speak the truth. As between the parties, the amendment would relate back to the date of the judgment—*Saffold vs. Wade, supra*. The amendment would utter no legal voice for or against the payment. As to that, it would be silent, and, consequently, would be no obstacle to a future assertion of it in resistance to any attempt to enforce payment a second time.

3. Of course, it was altogether too late for the administrators to set up that they did not have notice of the debt before administering in full. They do not pretend that they did not have notice of the suit, or were not duly served with the declaration and process. If they had a defense it should have been presented in proper time.

4. As to the surety, he need not and cannot interfere against this amendment because his risk has been increased by what

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has transpired since the judgment or before. The judgment was entered up in due time. It is against the surety as well as against the administrators, and is not void but irregular only. Thus, this case and the one in 52 *Georgia Reports*, 555, are unlike. In that case there was no judgment. The effort was to create one against the surety and the principal both. In this case the judgment is perfect as to the surety, and the motion is, to perfect it as to the administrators. Surely, this should be done, whether the surety is discharged or not. The administrators are not discharged; and why should they not be pursued, and how can they be regularly pursued without this amendment? The amendment may prove beneficial to all parties concerned, for while it will not aid the judgment so as to bind property in the hands of *bona fide* purchasers (12 *Georgia Reports*, 281,) it will doubtless make it available as against that which may have been distributed to the heirs since the judgment was rendered, and is still found in their hands. And, for aught that appears in the record, it is by distribution only that the estate has been administered. But in any event, whether the surety is now discharged depends not at all upon allowing or disallowing this amendment. Such an amendment cannot possibly prejudice him. He can assert his discharge quite as well after it is made as before.

5. The distinction between no judgment and one that is simply irregular, will dispose of the other point made by the surety; namely, that he was discharged by notice to sue, and that the judgment was fraudulent as to him, having been taken in violation of an arrangement between the attorneys to the contrary. Were there no judgment, this could be urged against a motion to enter one against the surety: 25 *Georgia Reports*, 681. But the irregularity now in question should be corrected, whether the surety has cause to open the judgment or not. The right to amend is very broad: 46 *Georgia Reports*, 529; 45 *Ibid.*, 117.

Judgment affirmed.

The Planters' Bank of Fort Valley *vs.* Houser.

**PLANTERS' BANK OF FORT VALLEY, plaintiff in error, *vs.*
JOHN A. HOUSER, defendant in error.**

1. Where an indorser of a promissory note stipulates with the payee thereof, that he indorses the same with the distinct understanding that the payee is not to proceed against him until he has first exhausted all the property of the principal, which is covered by a mortgage made by the principal to the payee at the same time that the note is made and indorsed, the said stipulation being in writing, though not on the note, and the contest being between the payee of the note and the indorser:

Held, that the payee of the note cannot proceed by suit against such indorser until he has first exhausted the property covered by the mortgage, and a plea setting forth the above facts and sustained by the proof, will suspend the plaintiff's right to sue the indorser until the mortgaged property has been exhausted.

2. A stipulation *not to proceed* against a party is an agreement *not to sue*.
3. Notice to sue the principal given by the indorser, even if in legal form, is not notice to sue the indorser himself, and does not estop the indorser from setting up the defense that he is liable only after the mortgaged property is exhausted.

Indorsement. Negotiable instruments. Contracts. Notice. Estoppel. Before Judge CLARK. Houston Superior Court. November Adjourned Term, 1875.

Reported in the opinion.

DUNCAN & MILLER; HALL, LOFTON & BARTLETT; B. S. DAVIS, for plaintiff in error.

W. S. WALLACE; W. A. HAWKINS, for defendant.

JACKSON, Judge.

The bank sued Houser, as indorser, on two notes amounting to more than \$10,000 00. Houser pleaded that at the same time that he indorsed the notes the principal debtor gave a mortgage on a large amount of property to the bank, and that the bank agreed in writing, in consideration of his, Houser's, indorsing the notes, to exhaust all their remedy on the mortgage "*before proceeding against Houser;*" yet, that they had sued him and had not exhausted their remedy against the

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mortgaged property, or proceeded against it at all to condemnation. It was admitted that this was so. The court held the plea good, and dismissed the action so far as respects the indorser; the bank excepted, and the whole question is, was the plea of defendant good?

1. There can be no doubt that the indorser could limit his liability by expressing the limit upon the note; but in this case the limitation was expressed in writing, but on a separate piece of paper, and the question made is, does the Code, section 2777, which authorizes the limitation of the indorsement of negotiable instruments "by express restrictions therein," by the indorser, confine the indorser to that mode, or may he do so on a different paper at the same time he indorses, and may he plead that fact in bar or suspension of the suit until the restriction has been complied with? The object of the requisition in the Code is, we think, to protect negotiable paper in the hands of holders other than the payee, but this is a suit between the payee and indorser. The payee knew all about the contract just as well as if it had been upon the note, and as, at the very time that the indorser indorsed the note, the payee stipulated not to proceed against him till he had exhausted other remedies, we do not think that, as between the parties to the contract, the implied restriction upon limitations of liability of indorsers in section 2777th of the Code, will apply. We think, two, that this case is distinguishable from *4 Georgia Reports*, 185, and perhaps other cases where, subsequently to the main contract, an agreement is made not to sue until a certain time. Here the condition of the indorsement is that the indorser shall not be proceeded against; it is part and parcel—it is of the very essence of the original agreement; if put on the note, the defense would be clear; and between the contracting parties it can make no difference in principle that it was not put on the note, but was a part of the contract of indorsement expressed in another writing. In the hands of an innocent holder, without notice, it might be quite different.

2, 3. We see nothing in Houser's notice to sue the princi-

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pal to prevent his setting up this defense. Independently of any defect in the form of the notice, notice to sue the principal is not a demand to sue the indorser. We need hardly add that to sue a man is certainly to proceed against him, and that when the bank sued it violated the agreement.

Judgment affirmed.

JAMES P. BRINSON, administrator, plaintiff in error, *vs.* **CHARLES WESSOLOWSKY**, administrator, defendant in error.

A. A. MURPHY et al., plaintiffs in error, *vs.* **CHARLES WESSOLOWSKY**, administrator, defendant in error.

Where exceptions to an auditor's report are based upon questions of fact, and no evidence is introduced in support thereof, the report will be sustained. *Aliter*, if the exceptions turn exclusively on questions of law.

Auditors. Before B. B. BOWER, Esq., Judge *pro hac vice*.
Dougherty Superior Court. April Term, 1876.

Reported in the decision.

D. H. POPE, for plaintiff in error in the first case.

W. T. JONES; STROZER & SMITH; WARREN & HOBBS; VASON & DAVIS, for defendant.

WARREN & HOBBS; W. T. JONES, for plaintiffs in error in second case.

D. H. POPE; STROZER & SMITH; VASON & DAVIS; WILLIAM OLIVER, for defendant.

WARNER, Chief Justice.

These were two bills of exceptions to the judgment of the court in this case, by different creditors, who were plaintiffs in

Brinson *vs.* Wessolowski.

error, and both were argued together. The case came before the court below on exceptions made to an auditor's report, when it was agreed that the case should be submitted to the decision of the court without the intervention of a jury. On hearing the case, the court overruled the exceptions, whereupon the plaintiffs in error excepted.

The court, under this submission, was bound to have decided the exceptions in the same manner as a jury would have done under the provisions of the 4203d section of the Code. The facts, as reported by the auditor, the court was bound to recognize as being *prima facie* the truth, unless controverted by evidence on the hearing, which it is not pretended was done in this case. The judgment of the court in this case was like the verdict of a jury, and will not be set aside unless it is without evidence to support it. So far from the decision being without evidence to support it, the only evidence before the court was the auditor's report, which was *prima facie* the truth: Code, section 3097. The legal presumption is, that the conclusion of the auditor was right under the evidence before him, unless controverted by other evidence. When there is an error of law apparent on the face of the auditor's report wholly irrespective of the evidence on which it is based, then the court can correct that error by its judgment. But that is not this case; the allowance or disallowance of the respective claims which were before the court, embraced in the auditor's report, was based on the evidence before him. Whether the respective claims were legal or illegal, properly or improperly allowed by the auditor, depended on that evidence, and as the auditor's report was *prima facie* the truth, and the evidence on which it was based not being controverted, there was no error in overruling the exceptions on the statement of facts contained in the record.

Let the judgment of the court below in both cases be affirmed.

Jossey *vs.* Stapleton.

JOSIAH W. JOSSEY, JR., plaintiff in error, *vs.* JOHN D. STAPLETON, defendant in error.

1. That plaintiff's cause of action was not set forth with sufficient clearness in his declaration, was no ground of non-suit. Remedy was by special demurrer or by objection to testimony.
2. As a general rule, a new trial will not be granted on the ground that a witness states, after the trial, that he was mistaken as to the facts testified to by him, the more especially when the defendant fails to show that he did not know the facts were different at the time the testimony was given.
3. The verdict was neither contrary to the law nor to the evidence.

Practice in the Superior Court. Non-suit. Pleadings. New trial. Before Judge CLARK. Webster Superior Court. March Term, 1876.

Reported in the decision.

JOHN R. WORRILL, for plaintiff in error.

GUERRY & SON; THOMAS H. PICKETT, for defendant.

WARNER, Chief Justice.

The plaintiff brought his action against the defendant on a written contract alleging a breach thereof to his damage \$200. On the trial of the case the jury found a verdict for the plaintiff for the sum of \$200 00. The defendant made a motion for a new trial on various grounds, which was overruled by the court, and the defendant excepted.

The presiding judge certifies that the 4th and 6th grounds taken in the motion were not true.

1. There was no error in overruling the defendant's motion for a non-suit because the plaintiff's cause of action was not set forth with sufficient clearness and distinctness. If the plaintiff's objection had been well founded it might have been good cause for special demurrer to the plaintiff's declaration, or to have objected to the plaintiff's evidence under it, but it was not a good ground for a non-suit.

2. As a general rule, a new trial will not be granted on the

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ground that a witness, who was sworn at the trial, states after the trial that he was mistaken as to the facts testified to by him, the more especially when the defendant fails to show to the court by his own affidavit that he did not know the facts were different at the time the witness testified to them at the trial: *Mitchell vs. Printup*, 25 *Georgia Reports*, 182; *Jones vs. McCrea*, 37 *Ibid.*, 48.

3. There is sufficient evidence in the record to support the verdict, and therefore it is not contrary to law nor the evidence. It does not appear from the evidence in the record, that the defendant did not know as much about the fence, or that he did not know that Adams did before and at the time of the trial as afterwards. There was no error in overruling the defendant's motion for a new trial.

Let the judgment of the court below be affirmed.

**GILBERT B. PETIT, plaintiff in error, *vs.* WILLIAM TEAL,
defendant in error.**

1. Running payments and over-payments on account, may be pleaded as a set-off to the plaintiff's account sued on, where the plea admits the latter to a certain amount, but disputes the balance; and if the plea be sustained by evidence, the defendant may have judgment for any excess which he ought to recover.
2. The exclusion of the defendant's books of account was not error, so far as appears to this court from the record.

Set-off. Evidence. Before Judge HILL. Bibb Superior Court. October Term, 1874.

The following, taken in connection with the opinion, sufficiently reports this case:

Teal sued Petit for \$98 00 due him for labor, as a carpenter. Defendant's plea admitted \$25 00 of this indebtedness, but alleged that the rest of the work was so badly done as to be valueless. It also pleaded, as set-off, an open account due by plaintiff to defendant, and certain over-payments which

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the latter had made to the former for previous work, amounting in all to \$154 00; and defendant prayed judgment for the excess due to him.

The evidence as to the amount paid by defendant to plaintiff, and as to the quality of the work done, was conflicting. Defendant testified that he was a mechanic and contractor; that he kept accounts with men employed by him in a book, and that the account with Teal was contained therein, and was accurate. The book was offered in evidence, but rejected by the court.

The jury, under the charge of the court, found for the plaintiff. Defendant moved for a new trial. The motion was overruled and defendant excepted.

A. PROUDFIT; WOOTEN & SIMMONS, by R. H. CLARK, for plaintiff in error.

R. W. STUBBS; HALL & LOFTON, for defendant.

BLECKLEY, Judge.

1. The defendant below admitted in his plea that the account sued on was just, to the extent of \$25 00, disputing the balance. The plea presented a counter-claim, by way of open account (annexing a copy), offering to set-off the same against the plaintiff's demand as admitted, and insisting that the plaintiff was indebted to the defendant the overplus, "which this defendant over-paid to Teal." The items of the account in defendant's favor, were shingles, tools and cash. There was some evidence in support of it, the defendant himself testifying very fully to its correctness. The court, it seems, charged the jury that they could not consider over-payments, on a plea of set-off, and that the defendant could not recover, on that plea, any amount over-paid. As we understand the charge, it excluded entirely from the case the most, if not all, of the defendant's account. We infer from the evidence that the parties had had no settlement, but that the dealings between them went on for some length of time, the

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plaintiff working for defendant at different jobs, and the defendant advancing him money, from time to time. This money, together with the other items charged in defendant's account, amounted, as the defendant claims, to more than all the work ever done for him by the plaintiff, including that now sued for. And he claims, also, that the latter—that is, the work now sued for—was very badly and improperly done, for which reason some of it was rejected, and the value of that accepted was only \$25 00 instead of \$98 50, the sum demanded for the whole. We think payments and over-payments occurring in this way, may be adjusted on a plea of set-off; and if, on a fair and just accounting, the balance be in favor of the defendant, that he may have judgment for it against the plaintiff. We see no trace in the evidence of any purpose by either party to give or claim any sum by way of gratuity. If over-payments were made negligently or by mistake, they can be rectified so long as they are not barred by the statute of limitations; and if they could be recovered in an independent action, they are a proper subject of set-off: Code, sections 2900, 3469. The jury allowed the whole of the plaintiff's account, and disallowed all of the defendant's. There was much conflict in the evidence, and if we were sure the case turned alone on the superior credibility of one set of witnesses over the other, we should not disturb the verdict; but, under the charge of the court, we think the jury most probably treated the defendant's account as excluded from their consideration upon a technical question of pleading.

2. As to ruling out the defendant's book, we cannot pronounce, from what is before us, that the court erred. Precisely what was testified as a foundation for introducing the book is not stated. Whether selling shingles and tools was in the line of the defendant's regular business, does not appear. Neither does it appear that he kept daily entries. On the contrary, the account annexed to the plea, which he testified was taken from his book, is, as to some of the debits and all of the credits, wholly without dates, not even showing the year, much less the month or day. Again, many of the charges

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are for cash, one item of \$90 00, one of \$75 00, one of \$60 00, and two of \$50 00 each. We are inclined to think that book entries, except for the mere purpose of refreshing a witness' recollection, are not evidence of such transactions: 3 Pick., 96, 109; 14 *Ibid.*, 8; 13 N. H., 421; 1 Fairfield, 9; 1 Yeates, 347; 2 *Ibid.*, 254; 4 Dallas, 153; 8 Watts, 39, 47; 1 Day, 104; 20 Conn., 258; 9 *Ibid.*, 84; 1 Harrington, 346; 8 John., 211; 12 *Ibid.*, 461; 3 Scammon, 120; 6 Halsted, 189; 2 *Ibid.*, 345; 1 *Ibid.*, 95; 3 Zabriskie, 457; 4 Wash. C. C., 698; 8 Hammond, 494; 17 Ohio, 156. There would seem to be good reason for admitting books to prove very small sums of cash advanced in the regular course of business, but where the amount is of such importance that a receipt or some written evidence might be reasonably called for by the party, books alone would be unsafe. Of course, in particular lines of business, such as banking, usage might be found to extend to all amounts alike. It has occurred to us, furthermore, that as books are admitted on the ground of necessity, (2 Hill, S. C., 677; 1 *Kelly*, 233; 17 *Georgia Reports*, 66; 20 *Ibid.*, 365,) the change of the law making parties themselves competent witnesses, may have a bearing on the general subject. Where the person who made the book is or can be examined, the reason for admitting the book at all is much abated in force. Still, as a party to the suit, though competent, is nevertheless, liable to be discounted by the jury in credibility, by reason of his interest, and as his books may tend to support his credit, there may be use for them for that purpose; and for that purpose, if for no other, there yet may be reason to admit them. We incline to think so.

Judgment reversed.

**WILLIAM BAGLEY, plaintiff in error, vs. JOHN T. ROBERSON,
defendant in error.**

1. In an action of trover against an administrator, who converted the property since the death of his intestate, the verdict and judgment against the

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defendant are correct, and the execution describing him as administrator, following the declaration in that particular, follows the judgment, the words administrator, etc., being merely *descriptio persona*, a description of the defendant.

2. An administrator who fraudulently converts property of another after the death of intestate, is personally liable for the *tort*.

Trover. Administrators and executors. Executions. Before Judge CRAWFORD. Chattahoochee Superior Court. March Term, 1876.

Reported in the opinion.

CARY J. THORNTON, for plaintiff in error.

BLANDFORD & GARRARD, for defendant.

JACKSON, Judge.

1. This affidavit of illegality was grounded upon the idea that as the suit was against Bagley, as administrator, and the verdict against the defendant, and judgment against defendant, and the execution against Bagley, administrator, the execution did not follow the judgment, and the verdict and judgment did not follow the declaration. But the declaration alleges that Bagley converted the property to his own use after the death of intestate; therefore the verdict against defendant, and the judgment against defendant, were right, and the execution simply told who defendant was as set out in the declaration; that is, that he was administrator, etc., but it did not command the money to be made *de bonis testatoris*, or rather of the goods of the intestate, but out of Bagley's own goods. Both the declaration and *fi. fa.*, in adding to his name "administrator," etc., merely described him: 51 *Georgia Reports*, 482, and did not at all vitiate the process or make it differ from the judgment.

2. That the judgment against him was right there can be no doubt. He converted the goods to his own use after the death of his intestate, and became personally bound: 15 *Georgia Reports*, 189.

Judgment affirmed.

Southwestern Railroad Company *vs.* Baldwin.

SOUTHWESTERN RAILROAD COMPANY, plaintiff in error, *vs.*
E. S. BALDWIN, defendant in error.

Where the proceedings on an application for the writ of *certiorari* are not returned to the next term of the superior court, unless such court convenes within twenty days after the issuing of the writ, the *certiorari* should be dismissed.

Certiorari. Before Judge CLARK. Sumter Superior Court.
April Term, 1876.

Reported in the decision.

S. C. ELAM, for plaintiff in error.

B. P. HOLLIS; ALLEN FORT; J. N. HUDSON, for defendant.

WARNER, Chief Justice.

This was a *certiorari* from a justice's court, and on the hearing thereof it was made to appear, as shown by the record and bill of exceptions, that the *certiorari* was sanctioned on the 17th of September, 1874, but was not returned into court or lodged in the clerk's office of the court to which it was returnable, until the October term thereof, 1875. The defendant in *certiorari* made a motion to dismiss it, which the court overruled, and the defendant excepted.

The overruling the defendant's motion to dismiss the *certiorari* was error, in view of the provisions of the 4057th section of the Code, which requires all writs of *certiorari* to be made returnable to the next superior court after the issuing of the same, unless the court shall sit within twenty days after the issuing of said writ. In this case, the writ was issued in September, 1874, and not returned until the October term of the court, 1875.

Let the judgment of the court below be reversed.

McDade *vs.* Hawkins *et al.*

WILLIAM T. McDADE, plaintiff in error, *vs.* WILLIS A. HAWKINS *et al.*, defendants in error.

1. That a request to charge, set out in the motion for a new trial, was made and denied, must be verified by the judge in the bill of exceptions, or elsewhere in the record, or this court will not, where the new trial has been refused below, entertain that ground of the motion, over the objection of opposing counsel, presented at the proper time.
2. The making of any request to charge is not sufficiently verified in the present case.
3. The jury had evidence before them to warrant the verdict.

Practice in the Supreme Court. Charge of Court. New trial. Before Judge CLARK. Sumter Superior Court. October Adjourned Term, 1875.

Report unnecessary.

GUERRY & SON, for plaintiff in error.

B. P. HOLLIS; N. A. SMITH, for defendants.

BLECKLEY, Judge.

1. The motion for new trial is the speech of the party, not of the judge. When the new trial is granted, the judge may be considered as speaking to the same effect; but when it is refused, there is no such inference to be drawn, for the refusal may have been because the recitals in the motion were unfounded in fact. If a request to charge was made, as alleged in the motion, what is more easy than to say so in the bill of exceptions? What the charge requested was, need not be repeated in the bill of exceptions; all that is necessary is, to affirm there that the charge, as set out in the motion, was requested and refused. Even this is not requisite, if the precaution is taken to have the judge declare, over his own signature, elsewhere in the record, as, in an entry on the motion, or in his order overruling the motion, that the recitals are true. It is enough that their truth be vouched by the judge somewhere;

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but he alone can authenticate them, and if there be no authentication, they cannot be considered by the supreme court ; certainly not, if objection be made by counsel for the defendant in error, at the opening of the argument : *Thompson vs. The Georgia Railroad and Banking Company*, 55 *Georgia Reports*, 458.

2. It is not stated in the bill of exceptions before us, or anywhere in the record, that the request to charge was made ; and objection was taken at the proper time to our acting on that ground of the motion. We, consequently, treat it as not in the case.

3. While the evidence, perhaps, is not strong enough to compel the verdict, it seems to us quite sufficient to warrant it ; and there was no abuse of discretion in refusing a new trial.

Judgment affirmed.

DOUGLASS & DOUGLASS, plaintiffs in error, *vs.* E. L. EBLIN, defendant in error.

A *bona fide* purchaser, without notice of a judgment when he buys from the defendant in *s. fa.*, is protected by four years' possession of the land, though it be levied on after his purchase, the levy remaining inactive until his four years' possession was complete ; the land is discharged in such case from the lien of the judgment.

Judgments. Levy and sale. Statute of Limitations. Before Judge KIDDOO. Randolph Superior Conrt. November Term, 1875.

Reported in the opinion.

E. L. DOUGLASS, by Z. D. HARRISON, for plaintiffs in error,

A. HOOD ; L. C. HOYLE, for defendant.

Dickson *vs.* Thurmond.

JACKSON, Judge.

This case differs from *Braswell vs. Plummer*, 56 *Georgia Reports*, 594, only in this respect. In that case, the levy was made before the purchaser, who held four years, bought from defendant in *f. fa.* In this case the levy was made after he bought. In both cases the levy was idle, inactive, did not move, until the *bona fide* purchaser had held the land four years. An inactive levy is proof of as much *laches* as no levy at all. The plaintiff may sleep his lien to death in one case as well as the other. As no notice of the judgment is brought home to the purchaser in this case, the whole court think that the purchaser is protected on the principle decided in *Braswell vs. Plummer, supra.*

Judgment affirmed.

THOMAS DICKSON, plaintiff in error, *vs.* GREEN THURMOND, defendant in error.

Where a justice of the peace, in issuing an attachment, neglects to add to his signature words or letters denoting his office, they may be added on motion, after proving that such officer was duly authorized to issue attachments, that he had signed in his official capacity, and had omitted the words of office accidentally.

Attachments. Amendment. Practice in the Superior Court. Before Judge HILL. Crawford Superior Court. March Term, 1876.

Reported in the decision.

A. L. MILLER; B. M. DAVIS; M. D. STROUD, for plaintiff in error.

BACON & RUTHERFORD, for defendant.

Roebuck *vs.* The State of Georgia.

WARNER, Chief Justice.

It appears from the record and bill of exceptions in this case that Dickson, the plaintiff, made an affidavit before T. A. Grace, J. P., for the purpose of obtaining an attachment against Thurmond, the defendant, but in issuing the attachment the name of T. A. Grace only was signed to it, the letters J. P. being omitted from his signature. The plaintiff made a motion before the court to amend the attachment by allowing the said T. A. Grace, who was then in court, to put the letters J. P. to his signature to the attachment, on proving that said Grace was a lawful acting justice of the peace in and for the county, and as such had signed said attachment, and by oversight, or negligence, had failed to add the letters J. P. to his signature. The court refused to allow the proof, or the amendment to be made, and dismissed the attachment, whereupon the plaintiff excepted.

This case comes within the ruling of this court in *Veal, administrator, vs. Perkerson*, 47 *Georgia Reports*, 92, and is controlled by it.

Let the judgment of the court below be reversed.

MARTHA J. ROEBUCK, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. Demand for trial is not cause for discharge, unless at the term when the demand was made and at the next succeeding term, there were juries impaneled and qualified to try the prisoner.
2. That there were such juries at both terms must appear to the supreme court affirmatively, in order for it to reverse a judgment of the superior court denying the discharge.
3. A mere recital in a motion for discharge presented by counsel, and which the superior court refused to grant, with no verification of the recital in the bill of exceptions or elsewhere in the record, is not sufficient evidence that there was a jury at the second of the two terms.
4. Where the bill of exceptions states that the indictments on which trial was demanded, were found at the April term, 1875, and the demand itself, as

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copied in the record, shows that they were found at April term, 1874, the term at which the demand was made, the record, and not the bill of exceptions, will be considered as giving the true date of the finding.

Criminal law. Demand for trial. Practice in the Supreme Court. Before Judge WRIGHT. Dougherty Superior Court. October Adjourned Term, 1875.

Report unnecessary.

H. MORGAN, by D. H. POPE, for plaintiff in error.

B. B. BOWER, solicitor general, for the state.

BLECKLEY, Judge.

The bills of indictment, if we are to date by the record and not by the bill of exceptions, were found at April term, 1874, We have evidence that at that term and at October term, 1875, there were juries impaneled, but no authentic evidence that there was any jury at October term, 1874. The statute prescribes the conditions of discharge, and they involve the impaneling of juries at two successive terms. We can neither assume the conditions, nor dispense with them.

Judgment affirmed.

JOHN W. THURSBY, plaintiff in error, *vs.* SARAH H. MYERS, defendant in error.

(BLECKLEY, Judge, was providentially prevented from presiding in this case.)

1. A deed dated 20th of July, 1821, though improperly admitted to probate and record, which the attorney who brought the suit obtained either from the plaintiff or the agent of the plaintiff, is admissible in evidence as an ancient deed more than thirty years old, the appearance being genuine, and the attestation and probate being right except proof of delivery.
2. An exemplified copy of a will from the ordinary's office is presumptive proof that it was properly probated, otherwise it could not have been recorded: Code, section 3822. Whether Mord. Myers was an abbreviation of Mordecai Myers was a question for the jury; and when the devisee and

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the executrix are the same person, and the demise is in the name of the devisee, the assent of the executrix to the legacy will be presumed; and the will, as a muniment of title, should be admitted in evidence, though objected to on the above grounds, and though letters testamentary were not offered in evidence, it being certified by the ordinary that such letters had been issued.

3. The instruction of the court to the jury to strike out certain years, naming them, from the defendant's adverse possession, is erroneous, as it withdraws from the jury the trial of the fact of possession during those years, and expresses an opinion thereon; but if the entire proof shows *beyond any dispute* that defendant never was in possession seven continuous years, he was not hurt by the charge, and a new trial will not be granted for such charge, because it could not have affected the verdict.
4. The record of a derivative or intermediate deed in a chain of title within time, will not cure the failure to record in time the original deed, or first deed from the state's grantee, so as to affect title in another from the same grantee of the state, acquired before such record of the intermediate deed.
5. After a lot of land is drawn, and before the grant from the state issues, the equitable title thereof is in the drawer, and the legal title is in the state for the use of the drawer, on his payment of the grant-fee; and as this equitable title is vendible—transferable—when it is sold, the legal title in the state, which was for the use of the drawer, became title for the use of his vendee, on the grant-fee being paid; therefore, when the grant issued to the drawer, the legal title which would have passed into the drawer if he had not sold his equitable estate, passes through him into his vendee by virtue of the statute of uses, and clothes the vendee with the complete title the moment the grant is issued. Such title being thus complete in the vendee, any subsequent deed made by the drawer after the grant, can convey no title, all title legal and equitable having passed out of the drawer to his first vendee; hence a deed made before grant but after draw, will authorize recovery in ejectment over any deed made by the drawer after the grant.
6. Though a tenant be put in possession of land with the understanding that he shall hold it a certain time, yet if he abandon the possession and leave the land vacant, the understanding that he was to hold possession will not keep the possession continuous.
7. The verdict was authorized by the law and the evidence.

Deeds. Wills. Evidence. Presumption. Prescription.
Charge of Court. Registry. Grant. Title. Ejectment. Possession. Before Judge WRIGHT. Decatur Superior Court.
May Term, 1876.

Reported in the opinion.

Thursby *vs.* Myers.

D. A. RUSSELL, for plaintiff in error.

B. B. BOWER; CAMPBELL & GURLEY, for defendant.

JACKSON, Judge.

The demise was laid in the name of Mrs. Myers, who claimed title, as devisee, under the will of her husband. Her husband's title was a deed, dated 20th of July, 1821, to Mord. Myers, signed by two witnesses, admitted to record in 1867, but under a probate deficient in showing delivery to Myers. This deed was made by Davis to Myers before he granted, but after he drew the land; and this was the plaintiff's title. The defendant held under the same grantee from the state on a deed younger than the grant. The jury found for the plaintiff, the defendant excepted, and assigns for error several rulings of the court, which are now before us for review.

1. The first assignment is that the court erred in admitting the deed from Davis to Myers. It was admitted as an ancient deed. The proof was that plaintiff's attorney got it either from Mrs. Myers, the plaintiff, or from her agent, he could not remember which. We think the deed was properly admitted, it being more than thirty years old, and coming from the proper custody. It is true that there was no possession under it, but it was executed in the presence of two witnesses, one of whom swore he saw it signed, and also that the other witness saw it signed, and being defective solely for want of proof of delivery, we think its age entitled it to go in: 31 *Georgia Reports*, 599; 33 *Ibid.*, 565; 43 *Ibid.*, 165.

2. The next error alleged was the admission of the exemplified copy of the will. It came as a copy of a record from the ordinary's office of Chatham county. It could not have got on record unless it had been proven, and the presumption is that it was duly admitted to probate. The Code covers the point: Code, sections 3822, 2432. As the plaintiff claims as devisee, it is not necessary that she show letters testamentary; the will is her muniment of title, and being her-

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self the nominated executrix, and the ordinary having certified that she took out letters, it will be presumed that she assented to the legacy.

3. The defendant claimed by prescriptive title also, and the court told the jury to strike out certain years when there was no possession. The ground of error does not fully appear, blanks being left therein not filled up; but we think there may be enough to show that the court did express his opinion on facts to the jury, and this is prohibited by the statute in positive terms. But the question is, did it hurt the defendant? We think not, for the reason that in no view of the facts is continuous possession for seven years made out.

4. It is also alleged as error that the court charged the jury, that if both original deeds from the common original feoffor were not recorded in time it could not relieve the want of record in time of defendant's first deed in his claim, that some intermediate or derivative deed was recorded in twelve months.

*We see no error in the charge.

5. But the great controlling question in the case, and which counsel especially requested us to decide, is whether the deed, older than the grant, but made after the draw, conveyed such title to the plaintiff as he could recover in ejectment on over a younger deed made after the grant? We think that this question has been clearly settled by the decisions of this court. It is true that in 15 *Georgia Reports*, 521, although a deed older than the grant was admitted in evidence, Judge BENNING, in delivering the opinion, seems to have put its admissibility on the fact that if the grant-fee had been paid *when the deed was made*, a perfect equity would be in the vendee, and thought they might be able to prove that, and therefore admitted the deed. It is true, also, that he argues to show from the old common law writers that there could be no estoppel on the grantee, and his assigns in such a case. But the same judge, afterwards, in delivering the opinion of the court in two cases, settled this case: In *Henderson vs. Hackney*, 23 *Georgia Reports*, 383, it was distinctly ruled that after the draw and before the grant, the equitable title was in the

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drawee, and the legal title in the state for his use when he paid the grant-fee, that this equitable title was vendible or transferable, and on its sale or transfer the state held the legal title for the use of the transferee, and that the moment the drawer paid the grant fee and got the grant, the legal title, without stopping in the drawer, passed at once into the transferee by the statute of uses, and thus the transferee held the complete title, legal and equitable. So in *Dudley & Henderson vs. Bradshaw*, 23 *Georgia Reports*, 17, the same point is distinctly ruled. These cases cover this, and the holder of this, old deed made before the grant, has the better title to this land.

6. We think that there is nothing in the point that because the tenant put in possession of land, obligated himself to continue there a certain term of years, and vacated it against his bargain; therefore, that the land was not vacant, but the owner in adverse possession all the time.

7. There is evidence and law to sustain the verdict.

Judgment affirmed.

GEORGE FREEMAN, plaintiff in error, *vs.* **PAULINE BINSWANGER**, defendant in error.

1. Where an execution commanded the proper officer to levy upon "the goods and chattels, lands and tenements of E., maker, and N., administrator of G., deceased, indorser," the estate of the deceased was not subject to levy thereunder.
2. In the absence of proof to the contrary, the presumption is that the execution followed the judgment on which it was founded, and it was therefore properly rejected when offered in evidence to bind the estate of deceased.

Administrators and executors. Executions. Judgments. Presumptions. Before Judge HILL. Bibb Superior Court. October Adjourned Term, 1875.

Reported in the decision.

HALL, LOFTON & BARTLETT, for plaintiff in error.

Freeman *vs.* Binswanger.

LANIER & ANDERSON, HILL & HARRIS, for defendant.

WARNER, Chief Justice.

This was a claim case, on the trial of which, as appears from the bill of exceptions, the plaintiff offered in evidence a *fi. fa.* issued from the justice's court in favor of Freeman, assignee, *vs.* Ezzell, maker, and Newton, administrator of Goolsby, deceased, for \$75 00, principal, besides interest and cost, which commanded the proper officer that of the goods and chattels, lands and tenements of Ezzell, maker, and Newton, administrator of Goolsby, deceased, indorser, he cause to be made the principal, interest and cost thereof, etc. The above *fi. fa.* was levied on certain described land and improvements, as the property of Goolsby, deceased, and claimed by the claimant. When the plaintiff offered in evidence the *fi. fa.*, the counsel for the claimant objected on the ground that the *fi. fa.* was against Newton individually, and not in his representative character, and did not bind, and could not be levied on, the property of Goolsby, deceased. The court sustained the objection, and the plaintiff excepted.

When cases are tried before a justice of the peace, he is required to render judgment therein according to the law and facts of each case: Code, section 4156. The law requires that in a suit against an executor or administrator, in his representative character, that the judgment *must* be *de bonis testatoris*, except when he pleads *ne unques executor, etc.*: Code, section 3573. The legal presumption is that the execution offered in evidence in this case followed the judgment, and if so, the judgment was not rendered *de bonis testatoris*, and did not bind the land of Goolsby, the deceased intestate, so as to authorize a levy and sale thereof, under the *fi. fa.* mentioned in the record, as his property. There was no error in sustaining the claimant's objection to the admissibility of the plaintiff's *fi. fa.* in evidence, for the purpose of subjecting the land levied on as the property of Goolsby, deceased.

Let the judgment of the court below be affirmed.

Wheeler *vs.* Thomas.

A. W. WHEELER, sheriff, plaintiff in error, *vs.* GEORGE W. THOMAS, defendant in error.

1. In answer to a rule against a sheriff for neglect of duty in levying upon and selling property, he cannot set up that he was served by defendant with an affidavit of illegality which was predicated solely on his own or his deputy's neglect of duty. No man can take advantage of his own wrong, or that of those under his authority and subject to his control.
2. In answer to rule, the sheriff may show that the *fi. fa.* has been paid off in whole or in part, and thereby that the plaintiff has not been injured by his default to the extent claimed, and it is error to strike such answer on demurrer, and make the rule absolute for the whole sum apparently due on the face of the *fi. fa.*
3. While a rule *nisi* calling upon the sheriff to show cause why he should not be attached for contempt in not paying over the sum found due on the rule absolute, is necessary before an order for attachment against him shall issue, yet the rule *nisi* calling upon him to show cause why he does not pay the money, may also contain in itself a rule *nisi* for attachment. The essential thing is that the sheriff shall not be attached and imprisoned without an opportunity to be heard.

Sheriff. Levy and sale. Damages. Contempt. Before Judge CLARK. Sumter Superior Court. April Term, 1876.

Reported in the opinion.

HAWKINS & HAWKINS; B. P. HOLLIS, for plaintiff in error.

GUERRY & SON, for defendant.

JACKSON, Judge.

This was a rule against the sheriff to show cause why he should not pay over a certain sum of money to the plaintiff on account of failure to sell defendant's property and collect the same. The sheriff showed for cause, in his answer, that defendant had interposed an affidavit of illegality on two grounds: first, that he had pointed out other property, and the sheriff had not levied on it; and, second, that he had received no notice of the levy from the sheriff; and also to the

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effect that the rule *nisi* was for too much; that the *fi. fa.* had been reduced by other payments not credited thereon, and in support of this last ground he appended the affidavit of W. A. Hawkins, the defendant, that he had paid certain sums thereon, and that no such amount as that claimed in the rule *nisi* was due. The plaintiff demurred to this answer, the court sustained the demurrer, and made the rule absolute for the amount claimed in the rule *nisi*, and ordered the sheriff attached, etc. There were sundry affidavits in respect to the amount due on the *fi. fa.*. The errors assigned are: first, that the affidavit of illegality protected the sheriff; second, that the court erred in sustaining the demurrer to the sheriff's answer, and making the rule absolute for the entire amount; and, third, that the court erred in attaching, or ordering the sheriff attached, without prior rule *nisi* calling on him to show cause why he should not be attached.

1. In respect to the affidavit of illegality we think that it cannot protect the sheriff. The grounds are, the sheriff's neglect of duty in not levying upon property in possession of defendant, pointed out by him, and in not giving defendant notice of levy. The sheriff cannot protect himself by his own neglect of duty, and his deputy's neglect is the same as his own. At least, he cannot defend himself by setting up that neglect.

2. In respect to the second point, we are constrained to hold that the sheriff was entitled to show that the *fi. fa.* was paid off in whole or in part, so as to fix the measure of his liability. *Prima facie* the plaintiff is hurt or injured to the amount on the face of the *fi. fa.* appearing due thereon, but the sheriff may show that this amount was not correct, and that the plaintiff is not injured that much. Suppose the sheriff, in his answer, said the whole *fi. fa.* was paid off, and the answer was not traversed but stricken on demurrer, should a rule absolute go against the sheriff unless the plaintiff traversed the answer and the fact was found against it? Certainly not. So if half, or any part were paid off, ought the sheriff still to pay the plaintiff *all?* The rule *absolute* binds the sheriff

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forever; he cannot go behind it; shall the plaintiff get money out of him, which he not only never lost by the sheriff's default, but never lost at all? It has been decided by this court that two things are necessary to fix the sheriff's liability by rule—contempt of court in not executing its process, and injury to the plaintiff: *Cowart vs. Dunbar*, 56 *Georgia Reports*, 417; *Hunter vs. Phillips*, *Ibid.*, 634; Code, section 3949. Of course injury to the plaintiff includes or involves the amount of the injury, and the sheriff is at liberty to lessen that amount by showing that the plaintiff has been paid on the *fi. fa.*, since judgment, money not credited thereon, and thus that he is injured only so much as remains due. In respect to the affidavits of what is due, we cannot see how they were considered or could have been on demurrer to the sheriff's answer. On the traverse of the answer testimony could be heard, the *onus* being on the sheriff to show that the amount due on the face of the *fi. fa.* ought to be lessened by sums paid to the plaintiff since judgment.

3. In regard to the third point, we think the regular course would be, after rule absolute, to serve rule *nisi* upon the sheriff to show why he should not be attached for contempt for not paying over the money found in that rule absolute, as held in *Wheeler vs. Harrison*, at this term; but in this case the rule *nisi* does call upon the sheriff to show cause both why he should not have rule absolute go against him and why he should not be attached. The two are blended in one, and this, though irregular, seems to have the sanction of this court: 18 *Georgia Reports*, 361. We reverse the judgment of the court below solely on the ground that the court erred in not permitting the sheriff to show, that since judgment sums had been paid upon the *fi. fa.* which were not credited thereon, and that thus he had not injured plaintiff as much as plaintiff alleged. Of course we do not mean to overrule what Judge LYON said in 30 *Georgia Reports*, 664, in regard to the sheriff having nothing to do with the equities between plaintiff and defendant. We mean simply to hold that the sheriff, in answer to rule, can show that the *fi. fa.* has been paid in

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whole or in part, in order to fix the injury he has done the plaintiff.

Judgment reversed.

SAVANNAH, GRIFFIN AND NORTH ALABAMA RAILROAD COMPANY, plaintiff in error, *vs.* GEORGE & HARTNETT, defendants in error.

1. Though the evidence be conflicting, if it is sufficient to support the verdict, this court will not control the discretion of the court below in refusing a new trial on the ground that the verdict was contrary to the law and evidence.
2. Newly discovered evidence which might have been produced at the trial by the exercise of proper diligence, is no ground for new trial.

Evidence. New trial. Before Judge HALL. Spalding Superior Court. February Term, 1876.

The following, taken in connection with the decision, sufficiently reports this case:

Evidence for plaintiffs, made, in brief, the following case: Defendant's train started from the depot in Griffin; began running pretty rapidly; when near "Simonton's Crossing" the whistle was blown, and the speed slackened while the train was passing through a "cut;" several witnesses went to the place shortly afterwards and found plaintiffs' horse dead beside the track; the body was still warm and limber, and steam rising from a large cut in the hips; there were tracks of a horse along the railroad; they turned as if to cross it; at this point there were evidences of a scuffle, as if the horse had caught its foot and fallen on the track; there were evidences that the horse had been pushed along the track for a short distance; the wound was bleeding when first found. Horse was worth \$125 00 to \$150 00.

Evidence for defendant was, in brief, as follows: The train was moving slowly; the engineer blew the whistle at crossing, according to his orders; did not do so after entering cut; it

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was a foggy morning; he saw something dark on the track, thought it was a bush; when within about thirty feet, saw it was a horse; it was perfectly dead and stiff; was lying on the embankment with its head downwards and its hips resting against the track; could easily have stopped the train before reaching it, but did not do so, seeing it was dead; the cow-catcher of the engine struck it and threw it from the track; it gave no signs of life; was not dragged by the engine.

Two witnesses for the defense swore that they saw the horse within an hour or an hour and a half after the train had passed; that it was stiff and swollen, having the appearance of having been dead several hours; saw very little blood.

One of the grounds for a new trial was the following newly discovered evidence: 1st. McKay and Fleak, who would testify that they passed the place where the horse was found some three hours before the train which was alleged to have killed it, and that it was then lying by the railroad apparently dead and stiff. 2d. The testimony of R. O. Jones, who would testify that he saw the horse five or ten minutes after the passage of defendant's train, and that it was stiff and seemed to have been dead for some time. The affidavit of defendant's agent at Griffin in support of this ground stated that he knew nothing of McKay's testimony until after the trial, but that from Fleak he had learned the facts set forth above shortly after the alleged killing of the horse.

SPEER & STEWART, for plaintiff in error.

E. W. HAMMOND, for defendants.

WARNER, Chief Justice.

The plaintiffs brought their action against the defendant to recover damages for the alleged killing of a certain brown mare by the careless and negligent running of its trains upon its road. On the trial of the case the jury found a verdict in favor of the plaintiffs for the sum of \$100 00. A motion for a new trial was made on various grounds, which was overruled by the court, and the defendants excepted.

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1. The main question on the trial was, whether the plaintiffs' mare was killed by the defendant's railroad train or not killed by it, and in relation to that point in the case the evidence was conflicting. The jury, as it was their province to do under the evidence, found a verdict in favor of the plaintiffs, and there is sufficient evidence in the record to sustain it if they believed the plaintiffs' witnesses, which was a question for them to determine, and not a question for the court to decide.

2. As to the newly discovered evidence, the main fact sought to be proved by it appears to have been known to the defendant's agent before the trial, and by the exercise of proper diligence could have been had at the trial, even if that evidence was not merely cumulative. We find no legal error in overruling the motion for a new trial on the statements of facts disclosed in the record.

Let the judgment of the court below be affirmed.

WILLIS A. HAWKINS, plaintiff in error, *vs.* THE COUNTY OF SUMTER, defendant in error.

1. A set-off by note or account cannot be pleaded to an ordinary judgment so as to arrest the execution issued thereon; much less can it be set up by affidavit of illegality to a tax execution.
2. A municipal or county corporation must be allowed to collect its revenues for local government upon principles of public policy, and the courts will not favor any interruption of such collection by affidavit of illegality claiming set-off.

Illegality. Judgments. Taxes. Set-off. Before Judge CLARK. Sumter Superior Court. April Term, 1876.

Reported in the opinion.

WILLIS A. HAWKINS; ALLEN FORT, for plaintiff in error.

B. P. HOLLIS, for defendant.

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JACKSON, Judge.

This was an affidavit of illegality upon the ground that the county owed Hawkins the amount of the tax *f. fa.*; the court dismissed it and Hawkins excepted.

1. We think that the court was right. If the execution had been issued on an ordinary judgment, it could not have been arrested by such an affidavit. It might have been stopped in equity if the allegation were made of plaintiff's insolvency, but not otherwise. More certainly is due to a tax *f. fa.* issued to keep up the county government, to raise revenue to hold courts, pay juries, build bridges and all ordinary county purposes of usefulness and necessity, than to an ordinary *f. fa.*; and if this affidavit would not stop such an ordinary execution, of course, *a fortiori*, it cannot stop this.

2. But outside of all this we think the county is entitled to collect its taxes without hindrance. It is part of the state government. The machinery of that government moves in great part by the county funds. The judicial process of the courts would stop but for the county co-operation. The jury system, the jail, as a place of temporary or final imprisonment to await or suffer the penalties of the criminal law, are kept up by the county finances. The interest is too big, too much the state's, to suffer any and everybody to use her courts to impede the counties in collecting taxes that *property* in the counties is liable for, and we rather think that in this respect the counties ought to be put on an equal footing, even with the state herself. However this may be, we have held that a municipal government could not be arrested, even in equity, in collecting her revenues by set-offs of the tax-payers. The government must have the money for great public purposes, and the tax-payer must pay it, and then he can sue if the municipality owe him aught and recover it: *Wayne et al. vs. City of Savannah*, 56 *Georgia Reports*, 448. If this be so even in equity and in the case of a city government, where does this affidavit against the county of Sumter stand? Certainly not upon any law of which we have ever heard.

Judgment affirmed.

Scott vs. Taylor et al.

SAMUEL T. SCOTT, plaintiff in error, *vs.* **HARRIET M. TAYLOR et al.**, defendants in error.

1. S. brought ejectment against T. Defendant's wife, Mrs. T., filed her bill, alleging that S., who was her brother, had purchased the land for her, under an agreement to give his notes for the purchase money and take title in his own name until such money should be paid; that, in the meantime, she and her family were to have possession of the property during her natural life, and at her death it should go to her children; that they went into possession in 1858, and so remained to the present time without other interruption than this suit, commenced in 1873; and that all the purchase money had been paid. The prayer was that the ejectment suit be enjoined and S. decreed to convey title to complainant and her children under the aforesaid agreement:

- Held*, that a demurrer to this bill, for want of equity, was properly overruled.
2. Under the above state of facts, the two cases being tried together, a verdict is too general which provides that upon the payment of a certain sum by complainant to defendant, the latter should execute and deliver to the former "a deed in fee simple to the premises in dispute." Notice should be taken of complainant's life-tenancy and of the remainder.
3. Where the jury had not awarded to defendant the full amount of interest to which he was entitled, it was error in the court to order a new trial conditioned upon the failure of the complainant to pay such additional amount of interest. The defendant was entitled to a new trial generally.

Equity. Verdict. Interest. New trial. Before Judge HALL. Rockdale Superior Court. April Term, 1876.

Reported in the decision.

CLARK & PACE; GEORGE W. GLEATON, for plaintiff in error.

J. J. FLOYD, for defendant.

WARNER, Chief Justice.

It appears from the record and bill of exceptions in this case, that Scott brought an action of ejectment against Alford Taylor to recover the possession of a certain described lot or parcel of land in the town of Conyers, Rockdale county. Pending the action of ejectment, Mrs. Harriet Taylor, the wife of the defendant therein, filed her bill on the equity side

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of the court, in which she alleged, in substance, that the land in dispute was purchased by Scott, who was her brother, from Alman, for the sum of \$332 17, under an agreement that Scott should give his notes for the purchase money, with his father as security, and take a deed in his own name until the purchase money should be paid, and, in the meantime, she and her family were to have possession of the property, and to hold it during her natural life, and then it was to go to her children, her husband, Alford Taylor, being insolvent. According to this agreement, on the 15th of November, 1858, Alman conveyed the land to Scott by deed, complainant and her family going into possession of the same with the knowledge and consent of Scott, and have remained in the uninterrupted possession of the same until the commencement of Scott's action of ejectment in July, 1873. The complainant further alleges that she has paid all the purchase money due for said land, the holder of the claim kindly consenting to receive one-half of the amount thereof in full payment, amounting to the sum of \$165 00. Wherefore complainant prayed that Scott might be enjoined from prosecuting his said action of ejectment and be decreed to execute a deed of conveyance to the complainant and her children to the land, in accordance with the aforesaid alleged agreement. By consent of the parties the bill and the common law action of ejectment were tried together. At the trial of the case Scott made a motion to dismiss the complainant's bill, which was overruled by the court, and Scott excepted.

The trial then proceeded, when there was a good deal of evidence introduced by the respective parties, which was conflicting. The jury, under the charge of the court, found a verdict in favor of the defendant in the ejectment suit, and found the following verdict in the equity cause: "We, the jury, find and decree in favor of the complainant, Harriet Taylor. We find and decree that complainant, Harriet Taylor, do pay or cause to be paid, on or before the 15th day of November next, (1876) to the defendant, Samuel Scott, the sum of \$90 00 principal, and the sum of \$25 20 interest there-

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on, and the further sum of \$25 00 for tax paid by said defendant on the premises in dispute, and the sum of \$3 50 interest thereon, these several sums making together the sum of \$143 70. And we further find and decree that on the payment of said sum of \$143 70, the said defendant, Samuel Scott, execute and deliver to the complainant a deed in fee simple to the premises in dispute."

A motion was made for a new trial on various grounds, amongst others, that the court erred in not dismissing complainant's bill at the hearing, because the verdict of the jury did not cover all the issues submitted to them, and because the amount of interest found in favor of the defendant, on the money advanced by him, was erroneous under the evidence. In disposing of the motion for a new trial, the court held that the verdict was erroneous as to the amount of interest allowed the defendant under the evidence, and granted a new trial on that ground, unless the complainant should, within ten days from notice of the judgment, pay to the defendant, or deposit with the clerk of the court for him, \$22 57, that being the difference between what the verdict was and what it should have been, in the opinion of the court, under the evidence, and if so paid or deposited, then a new trial should be refused, and overruled the motion for a new trial on all the other grounds contained therein; whereupon the defendant excepted, and assigns the same as error.

1. In view of the allegations contained in the complainant's bill, there was no error in the refusal of the court to dismiss it at the hearing.

2. The verdict of the jury was wrong, inasmuch as it did not find that the complainant was only entitled to a life estate in the land, and that her children were entitled to it after her death, in accordance with the terms of the agreement alleged in complainant's bill; whereas, the verdict vests the title to the land in the complainant alone, wholly ignoring the rights of her children, after her death, under the alleged agreement as set forth in her bill. If the complainant was entitled to a

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specific execution of that agreement the verdict should have been in accordance with its terms, and not otherwise.

3. The court decided that the defendant was legally entitled to a new trial under the evidence in the record, but deprived him of that right without his consent, by requiring the complainant to pay the amount for which the court, in its opinion, thought the verdict should have been. In other words, the court made the verdict under the evidence instead of the jury, and required the defendant to assent to it, or his legal right to a new trial should be denied to him. The defendant refused to assent to the condition imposed on him by the court and insisted upon his legal right to a new trial. According to the ruling of this court in *Jones vs. The Water Lot Company*, 18 *Georgia Reports*, 539, the judgment of the court below was error.

Let the judgment of the court below be reversed.

**JOHN LOWE, plaintiff in error, *vs.* THE STATE OF GEORGIA,
defendant in error.**

1. An indictment for simple larceny in stealing two hogs at the same time and place, though alleging that one is the property of one person, and the other of another, covers but one transaction, and charges but one offense, and judgment thereon will not be arrested.
2. Proof that defendant stole one of the hogs is sufficient to convict under such an indictment.

Criminal law. Indictment. Before Judge WRIGHT. Dougherty Superior Court. April Term, 1876.

Reported in the opinion.

VASON & DAVIS, for plaintiff in error.

B. B. BOWER, solicitor general, for the state.

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JACKSON, Judge.

The indictment alleged that the defendant stole two hogs belonging to different owners on the same day, and in the same county. He was found guilty and moved to arrest the judgment on the ground that two offenses were charged.

1. We think the indictment covers one transaction and charges but one offense, and is good—certainly good as against a motion to arrest the judgment after verdict.

2. The proof only justified the conviction for stealing one of the hogs. The penalty or punishment prescribed by the law, and inflicted by the judge, being the same whether one or both were stolen, the verdict is sustained by the evidence, and the motion for a new trial on this ground was properly overruled.

Judgment affirmed.

KERN & LOEB, plaintiffs in error, vs. H. K. THURBER & COMPANY, defendants in error.

A title obtained by fraud, though voidable in the vendee, will be protected in a *bona fide* purchaser from such vendee, without notice. The evidence of notice of the fraud was not sufficient.

Sales. Fraud. Before Judge CRAWFORD. Muscogee Superior Court. November Term, 1875.

Reported in the decision.

L. C. LEVY, Jr., by R. J. MOSES, for plaintiffs in error.

PEABODY & BRANNON, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendants to recover the possession of eleven barrels of sugar,

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of the alleged value of \$300 00, to which the plaintiffs claimed title. On the trial of the case, the jury, under the charge of the court, found a verdict for the plaintiffs for the sum of \$292 90. The defendants made a motion for a new trial on the several grounds therein set forth, which was overruled by the court, and the defendants excepted.

It appears from the evidence in the record, that the plaintiffs, in the month of April, 1875, sold in New York to Barnard & Company, of Columbus, Georgia, a bill of goods, which were shipped to them at the latter place, a part of which was the eleven barrels of sugar in controversy. Before the arrival of all the goods in Columbus, the plaintiffs learned that Barnard & Company were insolvent, and stopped the delivery of the goods *in transitu*—that is to say, that portion of them which had not reached the place of destination, but the eleven barrels of sugar had reached Columbus, and were sold and delivered by Barnard & Company to the defendants, and paid for by them at the price which the sugar cost in New York. The evidence in the record is that on the 24th of April, 1875, the date of the sale of the sugar to the defendants by Barnard & Company, the latter were in good credit and standing as merchants. The plaintiffs proved that in March, 1875, before the bill of goods was purchased of them, that Barnard & Company had mortgaged their stock of goods to secure an indebtedness to the amount of \$14,467 46, the same being a much larger amount than the value of their entire stock of goods. The mortgages upon their goods had not been recorded at the time the defendants purchased the sugar of them, and there is no evidence that the defendants had any knowledge thereof at that time, but, on the contrary, the evidence is that they were in good credit and standing. The court charged the jury, "that if they believed from the testimony that Barnard & Company obtained the goods by fraud and misrepresentation, and with the intent to sell and convey away the same to defraud their creditors, then Barnard & Company got no legal title to the same, and could convey none to the defendants if they had notice of such fraud in the

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purchase, or of such fraudulent intent in the sale to them. If the defendants knew that Barnard & Company obtained the sugars from the plaintiffs by fraud, and sold the same to them with a view to hinder and delay and defraud their creditors, or to keep from paying the plaintiffs, and this was known to the defendants, that will render void the sale to defendants. If defendants had notice that the sugars were bought by fraud from the plaintiffs, and they bought from Barnard & Company to assist them in defrauding the plaintiffs, or even if they bought the goods to drive a hard bargain with Barnard & Company, they having such notice, this would be a fraud of such character as to void the sale and render the goods subject; but if the purchase by the defendants was a fair purchase, in the ordinary course of business, without notice of any fraud on the part of Barnard & Company, then they got a good title, and the property is theirs. The whole case turns upon the *bona fides* of the transaction, and this is to be determined from the testimony."

So far as the purchase of the goods by Barnard & Company of the plaintiffs being fraudulent there can be no doubt, according to the statement of facts disclosed in the record; but is there sufficient evidence in the record that the defendants had *notice* of that fraud at the time they purchased the goods from Barnard & Company, to have authorized the charge of the court in relation to that point in the case and the verdict of the jury in pursuance thereof? A title obtained by fraud, though voidable in the vendee, will be protected in a *bona fide* purchaser without notice: Code, sections 2640, 2650. Fraud is not to be presumed, but must be proved; but being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence. What is the evidence in the record going to show that the defendants had any knowledge whatever of the fraud of Barnard & Company in purchasing the sugar from the plaintiffs at the time they purchased the same from Barnard & Company? The only circumstance from which such knowledge is sought to be inferred, is that the defendants bought the sugar on arrival from Barnard & Com-

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pany, who delivered it to them at defendant's store, they paying therefor the cost of the sugar in New York, which was about one cent per pound less than the cost of the sugar delivered in Columbus. Was this a circumstance from which fraud could be inferred so as to charge the defendants with a knowledge of the fraud of Barnard & Company in purchasing the sugar from the plaintiffs, the more especially as Barnard & Company were merchants in good credit and standing at the time? What is the evidence of fraud on the part of the defendants in regard to the purchase of the eleven barrels of sugar when closely examined and analyzed? Barnard & Company were merchants in Columbus, of good credit and standing, on the 24th day of April, 1875. On that day the defendants purchased of them eleven barrels of sugar, paying cash therefor at the New York price, at thirty and sixty days credit, which was about one cent per pound less than the cost of the sugar laid down in Columbus. It is quite probable that Barnard & Company may have intended to defraud the plaintiffs in making sale of the sugar, but the fact that the defendants purchased the sugar from them at the time and in the manner disclosed in the record, without more, does not, in our judgment, under the law, make out even a *prima facie* case of fraud against the defendants. A bare suspicion of fraud is not sufficient to charge a party with it and make him liable therefor under the law. The bare fact that the defendants purchased eleven barrels of sugar of Barnard & Company, on arrival in the city of Columbus, who at that time were merchants in good credit and standing, at the New York price, paying cash therefor, is not, without more, under the law, even *prima facie* evidence of fraud, and the court erred in overruling the defendant's motion for a new trial.

Let the judgment of the court below be reversed.

Price *vs.* Byne *et al.*

JOSHUA PRICE, plaintiff in error, *vs.* GILBERT M. BYNE *et al.*,
defendants in error.

(BLECKLEY, Judge, was providentially prevented from presiding in this case.)

A submission to three arbitrators, with power on their part to call in a fourth, is not such a submission as will make the award rendered a statutory award, so as to make it, on motion, the judgment of the court, it not being a submission of any case pending in court, and nothing in the submission showing that the parties intended to proceed under the statute, or to have the award made the judgment of the court under the statute.

Arbitrament and award. Before Judge CLARK. Lee Superior Court. November Adjourned Term, 1875.

Reported in the opinion.

W. A. HAWKINS, for plaintiff in error.

WARREN & ELY, for defendants.

JACKSON, Judge.

The sole question in this case is, whether this was a statutory or a common law award. The submission was to three arbitrators, naming them, with their right to call in a fourth in case of disagreement. Not a word was said about making the award the judgment of the court, nor was there any other ear-mark by which it could be ascertained that such was the intention of the parties. No case between them was pending in court, and we think that this case falls within the principle ruled in 27 *Georgia Reports*, 368, and is controlled by it. The submission does not seem to have followed the statute at all, and the award cannot be a statutory award: See, also, 47 *Georgia Reports*, 476; 29 *Ibid.*, 422.

This case is clearly distinguishable from *Phipps vs. Tompkins*, 50 *Georgia Reports*, 641. There the case was pending in court, the submission all right, and the only complaint was that the two arbitrators appointed by the parties acted, the third being absent and nobody objecting. In this case no case was pending, and the whole submission was wanting in

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any evidence that the parties intended to act under the statute. We think the court below was right in ruling that the award should not be made the judgment of the court, and we affirm the judgment.

WOOTSON L. GUNNELS, plaintiff in error, *vs.* ISAAC B. DEAVOURS, defendant in error.

1. Where the effect of the judgment of this court is, that no legal suits had ever been commenced, or legal judgments rendered, on the notes in controversy, such prior proceedings cannot be pleaded as former recovery, or pendency of former suit, to subsequent actions on such notes, even though commenced before the *remittitur* from this court was made the judgment of the court below.
2. An appeal must not only be frivolous, but intended for delay only, to authorize a judgment for twenty per cent. damages against the appellant.

Judgments. Pleadings. Actions. Appeal. Before Judge CLARK. Webster Superior Court. March Term, 1876.

Reported in the decision.

JOHN R. WORRILL; J. A. ANSLEY, for plaintiff in error.

W. A. HAWKINS, for defendant.

WARNER, Chief Justice.

It appears from the record and bill of exceptions, that Deavours sued Gunnells in a justice's court on three promissory notes, two for \$100 00 each, and the other for \$55 31, and that an appeal was taken from the decision of the justice to the superior court. On the trial of the appeal, the defendant pleaded a former recovery and the pendency of a former suit for the same cause of action. It appears that some former pretended suits had been instituted on these same notes in a justice's court, and carried by an appeal to the superior court, where a pretended judgment was rendered thereon, which was brought up to this court by writ of error,

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when it was held that the judgments were void: See *Gunnels vs. Deavours*, 54 *Georgia Reports*, 496. The present suits were commenced on the notes before the *remitititur* from this court was made the judgment of the court below declaring the pretended suits and judgments therein void, and it was those pretended suits and judgments which the defendant pleaded to defeat the plaintiff's recovery in the present suit. The court charged the jury that, notwithstanding the plaintiff admitted the facts as set forth in the defendant's plea, the same would not avail him as a defense, to which charge the defendant excepted.

1. There was no error in the charge of the court in relation to this point in the case. The legal effect of the judgment of this court, declaring the judgments and the proceedings on which the same were founded void, was to declare that no legal suits had ever been pending on the notes, or any legal judgments rendered therein which could be pleaded as a legal defense to the plaintiff's action.

2. The jury, under the charge of the court to inquire whether the defendant's appeals were frivolous, found the following verdict: "We, the jury, find for the plaintiff the sum of \$255 31, with interest and cost of suit, and we further find the appeals frivolous." On this verdict judgment was entered for the sum of \$51 06 for a frivolous appeal, to which the defendant excepted. The charge of the court, in relation to this point in the case, was error, as well as the judgment on the verdict for \$51 06, for a frivolous appeal. According to the provisions of the 3631st section of the Code, the appeal must not only be frivolous, but intended for delay only, to authorize a judgment for twenty per cent. damages against an appellant from a justice's court. The judgment of the court below will therefore be reversed, unless the plaintiff shall consent to write off from the judgment the sum of \$51 06, and in the event he shall do so, then the judgment of the court below to stand affirmed.

Let the judgment be entered in conformity with this opinion.

Ellis vs. Hammond *et al.*

**JOSEPH ELLIS, plaintiff in error, vs. PAUL F. HAMMOND,
executor, *et al.*, defendants in error.**

1. Where a deed to land is made on Sunday, and the money paid, the possession of the land having been previously given to the vendee, the law will leave the parties where it finds them. Both being in *pari delicto*, although the contract consummated on Sunday be illegal, the courts will not interfere.
2. Payment in Confederate money, made in April, 1865, both parties being ignorant of the surrender of the Confederates, was good.

Deeds. Contracts. Sunday. Confederate money. Payment. Before Judge WRIGHT. Calhoun Superior Court. March Term, 1876.

Reported in the opinion.

VASON & DAVIS; R. F. LYON, for plaintiff in error.

WARREN & HOBBS, for defendants.

JACKSON, Judge.

Ellis brought suit against Hammond for a tract of land lying in Calhoun county. The case was submitted to the judge for trial without a jury, with right of exception to take the case to this court. The facts were that an agent of Hammond bargained with Ellis for the place, and moved Hammond's hands thereon. A few days afterwards the price agreed upon, being some \$92,000 00 in Confederate money, was paid and a deed to the land made. This consummation of the trade, to-wit: the payment of the money and the deed to the land, took place on the 10th of April, 1865, on Sunday. The presiding judge held that he would not interfere with the possession of the land, and judgment was entered up for the defendant. The error assigned is that judgment, and by it two questions are made: 1st. Can the plaintiff recover because the deed was made and the money paid on Sunday? 2d. Can he recover because the money was Confederate treasury notes?

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1. In respect to the first question, it was ruled in 3 *Georgia Reports*, 182, that where an illegal contract was executed, neither a court of law nor of equity would interfere to aid either party. The parties being in *pari delicto* the law will leave them where it found them. The defendant is found in the possession of this land, and though the deed was made and the money paid on Sunday, and the consummation of the trade was thus illegal, the contract having been executed, the courts will help neither side. In 16 *Georgia Reports*, 461, the same principle was decided. In 44 *Georgia Reports*, 541, it was held that the promisor to pay wages, the promise being made on Sunday, could not set it up as a defense; and in 44 *Georgia Reports*, 642, it was ruled that where an illegal contract was made on Sunday and executed, the courts would not interfere. In the case at bar it seems the verbal trade was really made on another day, and consummated on Sunday. This, therefore, is a stronger case for the defendant than those referred to.

2. Can the plaintiff recover on the ground that no consideration was paid? We think not. This case, on this point, is fully controlled by the case in 34 *Georgia Reports*, 227. Indeed, that case was stronger than this to show want of consideration. In this case no knowledge of any important surrender of the Confederates was known to either party—it was the 10th of April, 1865—both acted fairly—neither committed any fraud—and the judgment must therefore stand.

Judgment affirmed.

D. C. DARKE, plaintiff in error, *vs.* SUSAN E. BUSH, defendant in error.

1. It is not the office of a promissory note given for borrowed money, to secure the application of the money by the borrower to a given object, although the purpose for which the money was borrowed be expressed in the note. Therefore, a judgment on the note, as such, is no adjudication upon any right of the lender, growing out of that part of the instrument.

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2. A representation made in writing may be contradicted by parol, except where it operates by way of estoppel. After being acted on, it will so operate upon some issues, but may not upon others. If, in reference to the issue on trial, the party acting upon the representation was, at the time he acted, in no worse case with the matter of the representation false than with it true, there is no estoppel which affects that issue, and the representation may be contradicted.
3. In 1872, land to the extent of the exemption allowed by the Code prior to the constitution of 1868, was exempt as against a claim for the purchase money. Consequently, a person who, in that year, lent money to another to pay for land, was in no worse situation, in respect to that exemption, if the land had been previously paid for by the borrower, than if that specific money had been applied to the purchase. In either case, the exemption would prevail. After the land had been duly laid off, in 1873, as exempt, and after the passage of the act of 1874, repealing exemptions as against purchase money, and after judgment, in 1875, upon the note for the borrowed money, and levy of execution from such judgment on the land, it was competent to contradict a representation in the note that the money was borrowed to pay for the land, and parol evidence was admissible for that purpose, on the trial of a claim interposed by the wife of the purchaser, and founded on the exemption right.

Promissory notes. Contracts. Evidence. Estoppel. Homestead. Before Judge PATE. Dooly Superior Court. March Term, 1876.

On March 15th, 1875, judgment by default was rendered in favor of D. C. Drake against Elijah Bush, on a promissory note of which the latter was maker and the former payee, made in 1872. Execution thereupon issued, and was levied on a certain tract of land, being the half of land lot number fifty-one, in the seventh district of said county. Claim was interposed by Susan E. Bush, wife of defendant in *fi. fa.*

On the trial, plaintiff introduced the note, which contained a statement that the money was "borrowed to pay for one-half of lot of land number fifty-one, seventh district of Dooly county, Georgia;" also the declaration with entry of service thereon, the judgment by default, and the *fi. fa.* He then introduced defendant to prove the execution of the note. Defendant testified that he received the money, but did not recollect the terms of said note; did not think it was read

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over to him. Plaintiff testified that he was present when the note was signed, and heard it read to defendant.

Claimant introduced evidence showing that none of the money received by defendant in *f. fa.* was used in the purchase of the lot in dispute; that it was paid for some time before the making of the note. She further introduced the proceedings before the ordinary by which the land had been set apart, in 1873, as a homestead, upon her application therefor, under section 2040 of the Code.

The jury, under the charge of the court, found the land not subject, and judgment was rendered accordingly. Plaintiff thereupon excepted, and alleged the following errors: 1st. That the court erred in admitting the testimony introduced by the claimant; that she being defendant's wife and privy to him, was therefore estopped. 2d. That the court erred in admitting evidence to contradict the terms of a written contract. 3d. That the court erred in refusing to charge the law of estoppel, when requested by plaintiff's counsel.

THOMAS P. LOYD, by Z. D. HARRISON, for plaintiff in error.

No appearance for defendant.

BLECKLEY, Judge.

1. The judgment adjudicated the lender's right to recover the money from the borrower on the note declared upon, but it settled nothing as to what was done or ought to have been done with the loan. The judgment was no obstacle to receiving the evidence offered to show that the loan was not applied as the note indicated it was or would be.

2. Treating that part of the instrument as a representation, it was open to contradiction even by parol evidence, unless it came with the force of an estoppel. And on the question in issue it did not have that force, for the reason that its truth or falsehood was wholly immaterial, in reference to that question, at the time the money was loaned.

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3. Then the exemptions of the Code held equally against purchase money and all other debts: 41 *Georgia Reports*, 180. It was otherwise with the large homestead allowed by the constitution of 1868, and if that had come in question, there might have been good reason for holding the borrower estopped: 45 *Georgia Reports*, 483. In the case before us, the exempt property was laid off and registered in the ordinary's office before judgment was rendered for the creditor, and before the act of 1874 was passed, changing the law which prevailed at the time of the contract. Granting that the debt was in fact for purchase money, the family of the debtor may have acquired a vested right which the act of 1874 could not divest. Upon this point the court below seems to have ruled nothing, and we, also, leave it untouched. We simply say that, notwithstanding the expression in the note, it was competent for the claimant to prove that the debt was not for purchase money.

Judgment affirmed.

BENJAMIN J. STILES, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. Where the main current of the evidence shows that defendant shot deceased twice with a pistol from an adjoining room, through the door, the room whence he shot being dark and the other lighted up, several feet being between the two; and that deceased, if armed at all, only had a common knife, and was not near enough defendant to use the knife upon him, and that deceased was not the assailant, and that defendant had made no effort, in good faith, to decline the combat; and where it was further proved that several days before, defendant had threatened to take the life of deceased:

Held, that the evidence would have authorized a verdict for murder; and where the verdict was only voluntary manslaughter, and the presiding judge refused a new trial, this court will not interfere.

2. Evidence of threats made four or five days before the homicide, is admissible to show malice.

3. Defendant cannot object to testimony of what transpired the same night at an adjoining village, when he himself first introduced it, though afterwards it be made to work against him.

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4. Where a difficulty commenced at one grogillery and terminated at another, the same night in the same village, all that transpired at both groggeries is admissible as *res gestæ*, though some interval of time may have intervened between the beginning and end of the rencounter.
5. It is not error in the court, in charging the jury on the subject of reasonable doubts, to tell them that they should reconcile all the testimony if possible, and if not, to believe those whom they thought most entitled to credit. The credibility of witnesses is matter peculiarly within the province of the jury.
6. In a contest, or personal rencounter, between two persons, where defendant set up the plea of acting in self-defense, sections 4331 and 4333 of the Code should be construed together; and it must not only appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge, but it must also appear that the slayer thought and believed, and had good reason to think and believe, that the danger was so urgent and pressing, *at the time of the killing*, that in order to save his own life, or prevent a felony on his person, the killing of the other was absolutely necessary; and it must appear also, either that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given.

Criminal law. Evidence. *Res gestæ*. Witness. Before Judge CLARK. Macon Superior Court. December Term, 1875.

Reported in the opinion.

HAWKINS & HAWKINS, for plaintiff in error.

C. F. CRISP, solicitor general, for the state.

JACKSON, Judge.

The defendant was indicted for the murder of William Crouch; he was found guilty of the offense of voluntary manslaughter; he moved for a new trial on the grounds stated in the record; the motion was overruled by the presiding judge, the defendant excepted, and the refusal to grant the new trial on all of the grounds in said motion is the error assigned.

1. The first ground is that the verdict was contrary to the evidence and the principles of justice, and without evidence to

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sustain it. The facts, in substance, were as follows: The defendant and Crouch, and two other young men, were at Montezuma at a ball or some similar frolic, where some little excitement arose between them, wherein defendant acted rather boisterously and violently. Any serious difficulty, however, was suppressed, and they all got on the cars and crossed the river to Oglethorpe; there they got off, went up into the town, renewed their frolic for a time, and then got into a more serious quarrel, which resulted in the homicide of Crouch. There is some conflict in the testimony whether Stiles, the defendant, who lived at Oglethorpe, invited the others to get off when they intended to go to Andersonville, or whether they got off on purpose to cause trouble. It is certain, however, that they went into a groggeries on the invitation of the defendant, to take a drink, and that after taking it they all went off and returned with fire-crackers, which they popped off in front of the groggeries. One of these crackers was fired off near defendant's person, at which he took offense, drew his pistol, and began threatening the party. After a little while he left, the others resuming their sport with the crackers, when he returned with a pistol in each hand, threatening to shoot. The other young men were in the groggeries, the bar-keeper stood in the door and told him to shoot him, to which defendant replied that he had nothing against him. The young men then got out, and they all went towards the grogillery of defendant's father, which was open; the defendant's father and brother being in it. The defendant shot once on the way to his father's grogillery, which was not far off. They all entered the grogillery—deceased, it seems, having entered first. There were two rooms to this grocery; the front room was brightly lighted up, the rear room in darkness. The defendant's father pushed him into the dark room, from which, through the door between the two rooms, he shot twice at deceased, who was near the outer door of the front room. Both shots were fatal, and deceased died in half a minute. There is some dispute whether deceased had a knife or not, and whether he was advancing to-

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wards defendant. It is quite certain that he must have been some distance from defendant when he was shot; and though the probabilities are, from all the testimony, that deceased had a knife, and that it was open, he could not have used it upon defendant, particularly with defendant's father between them. There is no evidence that deceased attempted to push defendant's father from between them, or that there was any difficulty at all between deceased and defendant's father. There was evidence that defendant had threatened that he would take the life of deceased.

In the light of these facts, we think that this defendant has done remarkably well to escape the gallows. If he had been found guilty of murder, and we had been called upon to review that verdict, we should have been constrained to say that there was evidence enough to support it. Punishment, five years in the penitentiary, when the judge might have sentenced him for twenty years, is very light for such a crime, and shows that the presiding judge tempered justice with much mercy. The verdict is in accordance with the principles of justice—at least the defendant is the last man who ought to complain of it.

2. The second ground is that the court erred in admitting the testimony of Laura Sykes. She swore that four or five nights before, defendant came to her house and said he had traveled all through Texas, was afraid of no man, and that he intended to kill deceased, repeating the threat twice, and cursing and abusing the deceased. We are utterly at a loss to see any legal reason why this testimony should have been excluded. The threats were evidence of malice, and proper to be considered by the jury.

3. The third ground is that the court erred in admitting the testimony as to what occurred at Montezuma. The defendant cannot object to it, for he introduced the witness who testified about it, and for the purpose, doubtless, of showing that deceased had followed defendant to Oglethorpe after some trouble at Montezuma.

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4. All that transpired at the both groggeries was properly admissible as part of the *res gestae*.

5, 6. It was objected that the court said to the jury, after giving in charge a request of defendant very favorable to him, on the subject of circumstantial evidence, and the exclusion of every other reasonable hypothesis before there could be a conviction of murder, "if the state has satisfied you that Stiles killed Crouch, then the law presumed malice, and it is incumbent on Stiles to show his innocence." Even if this were not law, which is not conceded, it did not hurt the defendant, as he was not convicted of murder.

It is also objected that the court, after charging, at the request of defendant, that if the jury believed that deceased was advancing upon defendant to commit a serious personal injury upon him, and he shot to save his own life, the jury ought to find him not guilty, added these words: "And the danger was so urgent and pressing that he shot to save his own life," etc., etc. This seems to be the plain language of the Code as laid down in section 4333. So, also, it was objected that to the charge, if defendant was acting under the fears of a reasonable man when he shot, the court also added: "If you believe that his life or person was in pressing and urgent peril." So, also, it was objected that the court, in charging one of defendant's requests, left out the words, "if these things be so." We think those words were mere surplusage, repetition, and that the plain sense of the request was fully given. So, again, it was objected that the court, in charging reasonable doubts, told the jury they should, if they could, reconcile all the evidence, and if they could not, then that they should believe those most entitled to credit. It seems to us that this was right. The main ground of defendant's counsel, if we understand it, seems to be that section 4331 of the Code, in respect to the circumstances of the killing being sufficient to excite the fears of a reasonable man, was construed in connection with section 4333, which enacts that "if a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing, that in order to

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save his own life the killing of the other was absolutely necessary," and that the deceased was the assailant, etc., etc. We think that the two should be construed together, and that in case of a renounter like the facts here show, the jury should be of the opinion that the defendant acted when he shot, under circumstances calculated to excite the fears of a reasonable man, and that he felt, at the moment he shot, and had reason so to feel from the circumstances, that he must then shoot to save his own life, or limb, or person, and this was fairly and fully given to the jury. We think, also, that to justify the killing in a combat like this, that it should appear that the killed was the assailant, or that the slayer had declined, or endeavored to decline, the combat in good faith: Code, section 4333. Taking the charge of the judge as a whole, we think the law was fairly and fully given to the jury.

Judgment affirmed.

P. D. DAVIS, sheriff, plaintiff in error, vs. AARON L. REID
et al., defendants in error.

1. Where the sheriff is ruled for not levying upon the defendant's property, and for returning the *f. fa. nulla bona*, an answer that he could find no property belonging to the defendant upon which to levy, and that therefore he made the return, is sufficient in substance.
2. If the answer be defective in not responding to specific allegations in the rule, touching possession of certain property by the defendant in *f. fa.*, the objection is matter for special, not general, demurrer.

Sheriff. Levy and sale. Pleadings. Before Judge WRIGHT.
Baker Superior Court. May Term, 1876.

Three judgments were obtained in Baker superior court against one Samuel P. Davis, by Reid and others. Executions issued thereon, and were placed in the hands of P. D. Davis, sheriff, to be levied. He returned them with entries of *nulla bona*, stating that the only property found in posses-

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sion of defendant in *fit. fa.* was trust property, and not subject to levy for his debts.

At the next term of the superior court, by agreement of parties, the three cases were embraced in one rule against the sheriff, calling on him to show cause why a rule absolute should not issue, and on failure to comply therewith, why he should not be attached. In the rule *nisi* it was alleged that defendant in *fit. fa.* was possessed, in his own right, of a plantation worth \$5,000 00, and personal property consisting of mules, wagons, etc., all within the county of Baker.

Defendant answered that he could find no property belonging to the defendant in *fit. fa.* on which to levy, and that no property had ever been pointed out by plaintiffs or their attorneys.

Plaintiffs demurred to the answer. The demurrer was sustained, and defendant excepted.

VASON & DAVIS; STORZER & SMITH; A. L. HAWES, for plaintiff in error.

WARREN & HOBBS, for defendants.

BLECKLEY, Judge.

1. The sheriff is not commanded by the law or by the writ, to levy on all property in the defendant's possession. The command is to levy on the goods and chattels, lands and tenements of the defendant. Possession is evidence, *prima facie*, of ownership: *Cowart vs. Dunbar*, 56 *Georgia Reports*, 417; but the sheriff may, at his peril, take notice of the true title; and when he answers to a rule that he could find no property of the defendant on which to levy, he has made a good answer, in substance, and one that protects him unless it is traversed. That there was property of a certain value in the defendant's possession while the writ was in the hands of the sheriff, is enough to change the *onus*; and, that much appearing, it will devolve upon him to vindicate his answer, either by showing exclusive title in some person other than the de-

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fendant, or that the property in question, though belonging to defendant, was exempt from levy and sale.

2. We gather from the argument of counsel that the sheriff's answer was deemed insufficient, and was stricken, because it did not respond to what was alleged in the rule *nisi* touching the possession of certain property by the defendant. As the answer was good, in substance, to the *gravamen* of the rule, the objection that it did not make discovery as to the alleged possession should, if available at all, have been taken by special demurrer, instead of by general demurrer as was done. If a defect of this sort had been pointed out specifically it might have been amended.

How can the plaintiffs in the execution admit what is stated in the sheriff's answer, and still entitle themselves to a rule absolute? If the answer is true, the sheriff could find no property *belonging* to the defendant. If it is not true, let it be traversed, and let the sheriff have an opportunity of supporting it by proof if he can: 34 *Georgia Reports*, 346.

Judgment affirmed.

ANDREW J. WILLIAMS, executor, *et al.*, executrix, plaintiffs in error, vs. JAMES A. ATWOOD *et al.*, executors, *et al.*, defendants in error.

1. The execution must follow the judgment, and not following it either in respect to the parties or the amount, it is an illegal process; if amended, the levy falls.
 2. This case, as now presented, was substantially decided by this court when here before.
- **Executions. Levy and sale. Amendment. Before Judge CLARK. Sumter Superior Court. April Term, 1876.**

Reported in the opinion.

HAWKINS & HAWKINS; ALLEN FORT, for plaintiffs in error.

Bradley *et al.* vs. Sadler *et al.*

LANIER & ANDERSON; B. P. HOLLIS; GUERRY & SON,
for defendants.

JACKSON, Judge.

This identical case was before this court, and a decision pronounced thereon, in 52 *Georgia Reports*, 585. The only difference in the facts is, that from the record then before the court it did not appear that any judgment was entered upon the confession of judgment; whereas, now it appears that the clerk once saw such a judgment, but it has been lost. But it still appears, even if the recollection of the clerk could be allowed to supply the judgment on the trial of a claim case, that the execution does not follow such judgment as recollected by the clerk, either as respects the amount or the parties. The levy was dismissed before, and it was affirmed by this court on two grounds: First, because the *ft. fa.* did not follow the judgment, considering the confession as the judgment, either as regards the parties or the amount; and second, because there was no judgment entered on the confession. If the latter is now cured, the former is not; and if the *ft. fa.* were amended, the levy must fall: Code, section 3495; *Manry et al. vs. Sheppard*, decided during the present term. The court, therefore, was clearly right in dismissing the levy, and the judgment is affirmed: See Code, sections 3636, 3495; 52 *Georgia Reports*, 585.

Judgment affirmed.

JEPTHA M. BRADLEY *et al.*, plaintiffs in error, vs. ANN D. SADLER *et al.*, defendants in error.

1. Where a copy of the bill of exceptions was not served upon opposite counsel until after the expiration of ten days from the certificate of the judge, the writ of error will, on motion, be dismissed. (R.)
2. That such paper was sent to the clerk's office by counsel living in an adjoining county, and filed on the fourth day after it was certified by the judge,

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and associate counsel residing in the county of the suit asked the clerk several times for the papers in the case, within time for perfect service, who replied that they had not come, will not prevent the dismissal. (R.)

3. Whether a bill of exceptions may be filed before service; and whether, having been filed, it can be withdrawn to perfect service? *Quare.* (R.)

Practice in the Supreme Court. Service. Practice in the Superior Court. Before the Supreme Court. July Term, 1876.

The bill of exceptions in this case was certified by the judge on May 27th, 1876; was filed in the clerk's office on the 31st and served on June 8th, 1876. Counsel for defendants moved to dismiss the writ of error because the bill of exceptions was not served within ten days from the date of the certificate of the judge.

In response to this motion, counsel for plaintiffs, as a part of his argument, submitted numerous affidavits which, in substance, showed that one of plaintiffs' attorneys resided in Lexington and one in Hartwell; that the attorney residing in the former place, immediately upon receiving the bill of exceptions from the judge, who resided in Warrenton, forwarded it by mail to the clerk of the superior court of Hart county, where the case was tried; that the original record was forwarded by express; that the attorney resident in Hartwell, upon being informed that the bill of exceptions had been forwarded by mail to the clerk, asked that officer for the papers in the case for the purpose of perfecting service; that he was at one time informed that the papers had not yet come, and at another that they were in the express office at Athens; that, as a matter of fact, at the times these various inquiries were made, the bill of exceptions was of file in the clerk's office, and the original record was in the possession of the express company at Athens; that after it was too late to perfect service within the time prescribed by law, in response to another demand, the clerk handed the original bill of exceptions to plaintiffs' attorney, who immediately served a copy thereof upon opposite counsel.

The court sustained the motion, enunciating the principles embraced in the above head-notes.

Middlebrooks et al. vs. Middlebrooks et al.

SAMUEL C. MIDDLEBROOKS, administrator, et al., plaintiffs in error, vs. MARY A. MIDDLEBROOKS, guardian, defendant in error.

1. Where a consent order is taken during the term at which a trial was had, to the effect that the brief of evidence and motion for a new trial may be perfected and said motion heard, at chambers, during the month of December, or previous to that time, as if in term time, and no brief of evidence or motion for a new trial is presented to the presiding judge until the 29th of the following January, he had no jurisdiction to entertain the motion, and a writ of error to his judgment overruling the same will be dismissed. (R.)
2. An explanatory note by the clerk, in the transcript of the record, by which it is sought to show that the consent order authorizing the motion for a new trial to be perfected and heard in vacation, as appeared on the minutes had been subsequently changed as to the time by which said motion was to be perfected and heard, will not be considered. (R.)
3. The minutes of the court below, as certified to by the clerk of that court, will be taken as correct. Extraneous testimony of the clerk and counsel, showing that the minutes, as they appeared, did not speak the truth, will not be considered. (R.)
4. Where the writ of error was dismissed upon the ground that the judge had no jurisdiction to entertain the motion for a new trial in vacation, at a time different from that appointed in the consent order, the case will not be reinstated, even though counsel for defendant in error make no objection thereto, and though the counsel, at whose instance the dismissal took place, would not have made the motion had he been apprised of an agreement between his associate and counsel for plaintiffs in error, extending such time. (R.)

New trial. Jurisdiction. Minutes. Practice in the Supreme Court. July Term, 1876.

When the above stated case was called, a motion to dismiss the writ of error was submitted, upon the ground that the exceptions were to the refusal to grant a motion for new trial, whilst the record disclosed that the case was tried at the October adjourned term, 1875, of Jones superior court, which was held on the first Monday in December; that during the term it was agreed that the brief of evidence and motion for a new trial might be perfected and the motion heard before Judge Hill, at Macon, during the month of December or previous to that time, and that his judgment in the case be returned to

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Jones county and entered upon the minutes of said court in vacation, as if in term time; that this agreement was approved by the court and ordered to be entered upon the minutes; that Judge Hill passed the following order overruling the motion:

“AT CHAMBERS,
“MACON, GA., January 31st, 1876.

“The accompanying rule *nisi* and brief of evidence, agreed upon by counsel connected therewith, in the case now stated, was presented to me on Saturday, January 29th, 1876, for sanction and approval, and granting or refusing a new trial therein.

“Whereas, I now entertain serious doubts of my authority to act in the premises, I propose to state them and make them part of the record: (Reciting facts above stated.)

“During the entire month of December I heard nothing further in regard to said motion for new trial, and supposed it had been abandoned. Some time about the middle of January I informed Mr. Bartlett, of counsel for complainants, that I supposed the motion had been abandoned. Assuming that I have the right and authority now to make the rulings that I would have made in December, had the motion been presented during that week, and not otherwise, I approve of the brief of evidence,” etc.

It was insisted that as the motion for new trial was neither made during the term, nor at the time in vacation appointed by the consent order, that the whole proceeding was *coram non judice*, and that therefore the writ of error to the judgment overruling such motion should be dismissed.

It was replied, that the record contained an explanatory note of the clerk, attached to the aforesaid consent order, as follows:

“*Explanation by clerk.*—The above agreement was made late one evening, and in pressing up the business of the court I placed it upon the minutes hurriedly. Afterwards, to-wit: next morning, during the hour for motions, the foregoing

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agreement was changed, and the month of January substituted for December. And the court having adjourned during the day, the entire papers in the case were delivered to defendant's counsel (by direction of the court,) and I omitted to make the correction on the minutes.

(Signed)

"ROLAND F. Ross,
"Clerk Superior Court, Jones Co., Ga."

Mr. S. D. Irvin, of counsel for plaintiffs in error, also submitted his affidavit, to the effect that on the morning after the consent order referred to in the record was taken, when the minutes were read, Mr. William A. Lofton, of counsel for defendant in error, moved to change the terms of the agreement by substituting January for December, stating that his business might compel him to be absent from Macon during the greater part of December; that the change was then agreed to and approved by the court; that deponent obtained the original order from the clerk and made the change by erasure and interlineation, and then read it as changed to the counsel, in the presence of the court; that he then handed the paper back to the clerk to make the correction on the minutes; that the clerk's note in the record shows why the change was not made.

The motion was sustained and the case dismissed, the court enunciating the principles embraced in the aboved head-notes.

Subsequently, counsel for plaintiffs in error moved to reinstate the case upon the following grounds:

1st. Because the writ of error was dismissed upon a mis-understanding of the facts and of the true record of the case.

2d. Because one of the counsel for defendant made the motion to dismiss in ignorance of the facts and of the obligation of his associate counsel to counsel for plaintiffs in error, and of the judgment of the court in relation to the motion for new trial, made in this case in the court below.

Upon this motion was the following acknowledgment of service:

"Service acknowledged of this motion, and upon instructions from counsel for defendant in error, I offer no objections

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to a reinstatement of the case upon the docket. December 26th, 1876.

(Signed)

Z. D. HARRISON,

"For C. L. Bartlett."

In support of this motion was read the affidavit of Mr. Lofton, the only material portion of which was as follows:

"The next morning after the consent order was taken, while the minutes were being read, at my request, counsel for plaintiffs in error agreed to extend the time for filing the brief of evidence and the motion for new trial until January, upon the statement by me that I feared I could not be in Macon at such time in December as the motion might come up to be heard, there being an adjourned term of Jasper superior court in December, which I was compelled to attend. Upon this statement it was announced as the understanding that the motion would be heard in January, and I supposed that the order had been so amended and entered on the minutes. The court approved the change, and I presume instructed the clerk to make the minutes conform thereto. Why the change in the minutes was not made, I do not know. When the case came up before Judge Hill, upon hearing the motion for a new trial, all the facts were agreed to by counsel for plaintiffs in error and myself. Upon hearing from Mr. Irvin that a motion to dismiss would probably be made by Mr. Bartlett, my associate, I wrote to him not to pursue such course, stating the aforesaid facts, (he not having been present at Jones superior court when the agreement was made.) Mr. Bartlett replied that he did not receive my letter in time or he would not have made the motion. The case was not brought by me, and giving it but little attention, as I did, it never occurred to me to state fully to Mr. Bartlett what had taken place in Jones county."

The court refused to reinstate the case.

BLOUNT & HARDEMAN; SAMUEL D. IRVIN, for plaintiffs in error.

C. L. BARTLETT; W. A. LOFTON, for defendant.

Curey *vs.* Hitch *et al.*

**DANIEL CUREY, plaintiff in error, *vs.* SIMON W. HITCH,
solicitor general, *et al.*, defendants in error.**

Where the judgment alleged to be erroneous is in favor of the solicitor general, the clerk and the sheriff, specifying the amount to be recovered by each, and the bill of exceptions only shows service of *a true copy* personally upon the defendant, the writ of error will be dismissed. (R.)

Parties. Service. Practice in the Supreme Court. July Term, 1876.

At the March term, 1872, of the superior court of Coffee county, at the instance of Curey, as prosecutor, the grand jury returned two true bills, one against six defendants for robbery, and one against two defendants for false imprisonment. At the following October term the cases were settled by the prosecutor and the defendants, with the consent of the presiding judge, upon condition that the prosecutor pay all legal costs. In pursuance of this agreement the true bills were quashed. Curey paid to the solicitor general \$133 00 as the legal costs. Subsequently, at the April term, 1876, he filed an affidavit stating that he had been charged by the solicitor general too much costs. The solicitor then moved to take the following order, stating the cases: "Whereas, the above stated cases were settled by order of court, at the October term, 1874, and there was a failure to enter judgment against the prosecutor for costs, it is ordered by the court that Simon W. Hitch, solicitor general, do recover from Daniel Curey, prosecutor, the sum of \$160 00, and that S. P. Gas-kin, clerk, do recover the sum of \$40 00, costs, and that the sheriff do recover the sum of \$18 00, costs. And it is further ordered that this judgment be entered upon the minutes of this court *nunc pro tunc*."

To this order Curey filed numerous objections, attacking the amount awarded to each of the aforesaid officers of court. The objections were overruled, and Curey excepted.

The only evidence of service of the bill of exceptions was the following entry:

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"I have this day served a true copy of the within original bill of exceptions personally upon the defendant. This April 13th, 1876. (Signed) D. H. JOHNSON, Sheriff."

Counsel for defendants moved to dismiss the writ of error because all the defendants were not served with the bill of exceptions; and further, because it was impossible for the court to be informed, from the entry, which one was served.

The motion was sustained and the case dismissed.

J. M. DENTON; G. J. HALTON, by brief, for plaintiff in error.

SIMON W. HITCH, solicitor general, by HARRISON & CLAYTON, for defendants.

THE MOBILE AND GIRARD RAILROAD COMPANY, plaintiff in error, *vs.* WILLIAM H. JONES, assignee, defendant in error.

1. A guaranty of the solvency of notes, made by a party who paid the notes to a contractor for work done for such party by the contractor, on a contract to pay him in the notes of others, to be made good if insolvent, is not a promise to pay the debt of another, and therefore not within the statute of frauds.
2. Suit on such guaranty must be brought within four years after the right of action accrued, and the right of action accrued just so soon as the insolvency of the makers of the notes was ascertained, or with reasonable diligence ascertainable.

Contracts. Promissory notes. Statute of limitations. Before Judge BUCHANAN. Muscogee Superior Court. November Term, 1875.

Reported in the opinion.

PEABODY & BRANNON; JAMES JOHNSON, for plaintiff in error.

THORNTON & GRIMES; R. J. MOSES, for defendant.

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JACKSON, Judge.

This was a suit brought by Woolfolk against the railroad company for the recovery of a debt alleged to be due by the company to him for work performed in building a piece of the company's road in Pike county, Alabama, or rather on a guaranty of the solvency of certain notes received by Woolfolk from the company for that work. The same case was here before, at the July term, 1875: 55 *Georgia Reports*, 122, and was then sent back because the plaintiff was, in the judgment of this court, improperly non-suited. On its return to the superior court the plaintiff, Woolfolk, recovered a verdict for \$6,437 00; the railroad company moved for a new trial on many grounds, the motion was overruled, and defendant excepted.

The record is very voluminous, but for the purposes of this decision it is not necessary to consider and to decide all the points nor to recite the whole testimony. The plaintiff contended that he contracted with John H. Howard, president, to grade the road in Pike county, at a certain price, and took in payment thereof certain notes on citizens of that county, which Howard, for the company, guaranteed; that he did the work, tried to collect the notes, failed for the reason that the parties became insolvent, and that the company owe him the debt. The defendant says that he was to take, and did take, the notes in final payment, and that it never guaranteed their solvency or collectibility, and that thus the plaintiff is fully paid off, and has no right of action. It says, too, that the guaranty was beyond the power of Howard to make, and that the company never ratified it, and besides, that as it was a promise to pay the notes given by others, it was void, not being in writing.

1. When this case was before us before, we held that there was *prima facie* a case made out by plaintiff upon his testimony then here, and that the court erred in non-suiting him. Now the whole testimony is in for the plaintiff and for the defendant, and it is quite conflicting, but there is enough, we



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think, to sustain a verdict for the plaintiff, unless it was necessary that the contract should be in writing—that is to say, the evidence of Woolfolk and of Cooper, and the fact that before Woolfolk would sign a receipt for certain money and for these notes, he had stipulated in the receipt that the company guaranteed the solvency of the notes, show enough to justify the jury in finding that such a contract was made by Howard; and then the fact that the company ratified it, the jury might, we think, infer legitimately from the appointment of a committee to investigate the accounts of the treasurer, and their report thereon made and approved by the stockholders. This receipt must have been one of the vouchers examined by the committee when they investigated the treasurer's receipt. Assuming that the contract was made as contended for by Woolfolk, must it have been in writing? That depends on the point whether or not it was a promise to pay the debt of another or the company's own debt? If Woolfolk's version be correct, it was to pay its own debt; it was to guarantee certain papers that the defendant had turned over to him in lieu of money, and which it agreed to make equal to money. We do not think it comes within the statute of frauds. We think, therefore, that no error was committed by the court in refusing to interfere with the verdict on these points. The law upon them was substantially given in charge to the jury, and they found the facts.

2. But the defendant says that the plaintiff is barred both by the act of 1869 and by the four years' statute of limitations, each of which, we think, is substantially pleaded, and that the court erred in his charge on these statutes. The contract was made in 1859 or 1860; the work was finished in January, 1862; the notes, according to the receipt, were then turned over to Woolfolk, but according to his testimony and that of others, they were turned over prior to that time. The court charged the jury to the effect that Woolfolk should have had a reasonable time to ascertain if the makers of the notes were solvent, and if he could enforce their collection; that at the expiration of this time he should have sued, and

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if it expired before the 1st of June, 1865, he ought to have sued before the 1st of January, 1870; if such reasonable time did not expire until after 1st of June, 1865, then he ought to have sued within four years from the 21st of July, 1868. The latter part of this charge was certainly erroneous and probably controlled the case : 49 *Georgia Reports*, 431. Certain it is that if the jury found that the right of action accrued by the lapse of the reasonable time referred to them by the court, before June, 1865, the case was barred by the statute of 1869. They must have found that such reasonable time did not expire until after June, 1865, and as the action was brought within four years from the 21st of July, 1868, they were obliged to find for plaintiff on the latter branch of the charge. This charge was erroneous and controlled the case, and a new trial must be granted thereon unless the facts show that defendant was not hurt ; that is, that if the court had charged correctly, it would not have been any worse off. And an effort was made by plaintiff to show this. But if the contract was that the solvency of these notes was all that the company guaranteed, then the moment the plaintiff ascertained the insolvency, he was bound to sue. The testimony seems to be strong that many, perhaps most of them, were insolvent in 1866 ; if so, and if the solvency only was guaranteed, and that only was to be ascertained, he was clearly barred as to all those notes so insolvent, or the guaranty thereon. If the contract was that the guaranty extended to collectibility, and the plaintiff was to ascertain whether the notes could be collected, it is difficult to see how a note on an insolvent person could be collected, and when, in 1866, many of them were insolvent, known to be so, that insolvency was evidence of the fact that they could not be collected, and still he would be barred. If the contract was that plaintiff was to sue the notes and thus ascertain the fact of the impossibility of their collection, then it seems from the evidence that he did not give security for certain costs and suffered a non-suit. If he agreed to sue to insolvency, he ought to have secured the costs and not have suffered non-suit. If

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he reply that he appealed to the supreme court of Alabama, after moving to reinstate, and failed, or the cases are still pending somewhere, then he has not sued them yet to insolvency. The utmost limit to be allowed him on the statute, it seems to us, would be from the dismissal or voluntary non-suit suffered by him in 1867, unless there be some other evidence not before us in this record. At all events, it is conceded that the court erred in the latter branch of the charge on the statute, and it is not clear that the defendant was not seriously hurt thereby. On the contrary, we think a fair examination of the record will show that the defendant was hurt.

Then, again, the evidence shows that the verdict is for too much, and, in this respect, against the evidence. With the error of the court on the statute of limitations staring us in the face, we cannot write it off and let the balance remain. It would be unjust to defendant, and therefore illegal. We reverse the judgment on the ground that the court erred in the charge on the statute of limitations. This was an Alabama contract. On the point when suit should be brought on a guaranty of insolvency, see 6 Alabama Reports, 745.

Judgment reversed.

ALBERT. MENDLESON, plaintiff in error, *vs.* SHADBACH S. PARDUE, trustee, defendant in error.

A junior judgment for money, though in favor of a trustee and based on the conversion of trust property, is not entitled to priority, over older judgments against the defendant, in the distribution of a fund brought into court under process of garnishment.

Judgments. Trusts. Before Judge TOMPKINS. Richmond Superior Court. October Adjourned Term, 1875.

Reported in the decision.

C. H. COHEN, for plaintiff in error.

H. CLAY FOSTER, by SALEM DUTCHER, for defendant.

Mendleson *vs.* Pardue.

WARNER, Chief Justice.

This case came before the court below on a rule against the sheriff to distribute money, on the following statement of facts: Shadrack S. Pardue, as trustee for Mary S. Pardue and children, sued out an attachment against James H. Pool for the sum of \$2,840 68, which was levied by serving a summons of garnishment on Heard & Company, as garnishees of Pool. In June, 1870, the plaintiff in attachment obtained judgment against Pool for the aforesaid sum of money, for trust property which he had converted. The money in the sheriff's hands was raised from the garnishees, as the property of Pool. Mendleson placed three justice court *fi. fas.* in the sheriff's hands, issued on judgments obtained against Pool in December, 1869, and claimed that the money due thereon should be paid out of the money in the sheriff's hands, raised from the property of Pool. The court ordered the money in the sheriff's hands, realized by the garnishment upon Heard & Company, to be paid over to Pardue, trustee; whereupon Mendleson excepted.

The judgment against Pool in the attachment suit in favor of Pardue, trustee, in which the summons of garnishment is issued, is dated in June, 1870. The judgments on which Mendleson's *fi. fas.* issued against Pool, are dated in December, 1869, and being of older date than Pardue's judgment against Pool, were entitled to priority of payment out of the proceeds of his property. The money in the hands of the sheriff was raised by virtue of a process of garnishment as the property of Pool in the hands of the garnishees, and should have been distributed as such between his judgment creditors according to the priorities now established by law: Code, section 3545.

Let the judgment of the court below be reversed.

Parker *vs.* Jones *et al.*

MARTHA J. PARKER, executrix, plaintiff in error, vs. JOHN JONES *et al.*, defendants in error.

(BLECKLEY, Judge, was providentially prevented from presiding in this case.)

1. A *bona fide* purchaser for value from a mortgagor, with seven years' possession of land, will hold the land free from the encumbrance of a mortgage not recorded in the time prescribed by law, the purchaser having neither actual nor constructive notice of the mortgage.
2. Possession under a deed, with actual possession of part of the land covered by the deed, will embrace the whole tract described in the deed, whether such tract be one lot or a number of lots.
3. If a vendor convey land by deed to vendee before he has title himself, and afterwards the vendor does acquire title, his subsequent title enures to the benefit of the vendee, and complete title is vested in the vendee the moment the vendor acquires it.

Mortgage. Prescription. Registry. Notice. Deeds. Vendor and purchaser. Before Judge WRIGHT. Baker Superior Court. May Term, 1876.

Reported in the opinion.

WARREN & HOBBS, for plaintiff in error.

D. A. VASON, for defendants.

JACKSON, Judge.

Parker foreclosed a mortgage against Irvin, administrator of Bond, and levied the *f. fa.* upon a tract of land which Jones claimed. The judge found the land not subject, on a statement of facts submitted to him, and the question is, did he find right. The facts are as follows: The plaintiff in *f. fa.* granted from the state certain adjoining lots of land in September, 1863, and sold them the same day to the defendant, Bond, taking his mortgage on the land for the purchase money. This mortgage was recorded in July, 1867, and was foreclosed in 1871, and levied in 1872. On the 25th of August, 1863, Bond sold the land to Jones, the claimant, and gave him a deed therefor. Jones took possession, and built

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upon and cleared one of the lots, and exercised dominion over the other lots embraced in his deed by cutting timber thereon, and held the whole tract in adverse possession in this way for more than seven years. Three questions are made by these facts.

1. Is Jones' title good by prescription against the mortgage? We think it is. Jones was an innocent purchaser without actual notice, and the mortgage was not recorded in time, nor before his purchase, therefore without constructive notice: Code, section 1957.

2. Did Jones' possession cover the whole tract described in the deed, or only the one lot he had cleared? We think it covered the entire tract, and that the word tract in the statute means all the land embraced in a deed and lying contiguous, no matter of how many different parcels or lots it was originally composed: Code, section 2681; 15 *Georgia Reports*, 545; 44 *Ibid.*, 607.

3. If a vendor convey land to a purchaser before he acquire title himself, and he subsequently acquire the title, does such title enure to the benefit of the vendee as against subsequent purchasers or mortgagees? We think it does, and such subsequent mortgagee and those holding under him by subsequent conveyances, hold subordinate to the title which vested in his first vendee the moment the vendor himself got it: 23 *Georgia Reports*, 383; 29 *Ibid.*, 17. This case is clearly distinguishable from *Stokes vs. Maxwell*, 53 *Georgia Reports*, 657. There the title of the purchaser was subsequent to the mortgage; here it is prior to the mortgage; the mortgage is not recorded in time to affect the purchaser, and he bought without notice, actual or constructive.

Judgment affirmed.

Foster *vs.* Jackson & Clayton.

AMELIA E. FOSTER, plaintiff in error, *vs.* **JACKSON & CLAYTON**, defendants in error.

The seventh amendment to the constitution of the United States, providing for a trial by jury in all suits at common law where the amount in controversy shall exceed \$20 00, relates only to proceedings in the United States courts.

Constitutional law. Jury. United States Courts. Before Judge McCUTCHEON. Bartow Superior Court. January Term, 1876.

Reported in the decision.

WOFFORD & MILNER, for plaintiff in error.

WARREN AKIN & SON, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant on two promissory notes. At the trial of the case the defendant withdrew her plea, and there being no issuable defense filed on oath, the court awarded judgment against the defendant for the sum of \$962 50, principal, and \$167 00 for interest, to the awarding of which judgment the defendant excepted on the ground that the court erred in awarding a judgment for more than \$20 00, without the intervention of a jury, and the case was brought up to this court for review on a writ of error.

When the case was called here there was no appearance for the plaintiff in error, but the defendant in error made a motion to open the record, and prayed for an affirmance of the judgment, and also claimed damages for delay in bringing the case to this court. There was no error in awarding the judgment in this case by the court below, without the intervention of a jury. Article 7th of the amendments to the constitution of the United States, relates only to trials in the courts of the United States, and not to the trial of cases in the state courts, as has been repeatedly decided by the supreme court of the

Kent & Company *et al.* vs. Plumb *et al.*

United States: 18 Howard's Reports, 280; 21 Wallace's Reports, 557, and other cases. We therefore affirm the judgment of the court below.

Judgment affirmed.

KENT & COMPANY *et al.*, plaintiffs in error, vs. DANIEL B. PLUMB, trustee, *et al.*, defendants in error.

(BLECKLEY, Judge, having been of counsel, did not preside in this case.)

1. Sale of the wife's separate estate to the husband's creditor to pay his debt is void, and the purchaser acquires no title. If the purchaser be not the actual creditor but his agent, taking the title in his own name, while the facts show that the real purpose was to collect his principal's, the creditor's, debt, the sale is equally void, and the deed will be set aside. Equity abhors all deceit, and will allow nothing to be done indirectly which cannot be openly and directly done.
2. It is the duty of the trustee to preserve and protect the trust estate; and if he sell real estate settled in trust upon the wife and her minor son, and take a note therefor on the husband and his partner in failing circumstances, with no security, in order to obtain a *line of credit* for said firm by paying their debt, and if the purchaser be cognizant of all the facts, having acted as agent in thus collecting the debt of the husband's creditors, and promising to procure them the *line of credit* from his principals in order to get the trade consummated, the trustee is guilty of breach of trust, the purchaser is *particeps criminis*, and gets no title, though the trustee be authorized to sell by the wife's direction, and she does direct the sale, and the deed should be set aside as well in behalf of the minor as of his mother, the wife.
3. The grounds of the motion for new trial must be certified to be true by the court below before this court will consider them, and a new trial will not be granted on the ground of the admission of improper evidence, even if improper, over objections of the party complaining, unless so certified, especially where the evidence is abundant to sustain the verdict without the aid of that said to have been objected to.

Husband and wife. Trusts. Deeds. Minors. New trial. Before Judge PEEPLES. Fulton Superior Court. October Term, 1875.

Reported in the opinion.

Kent & Company *et al.* vs. Plumb *et al.*

A. W. HAMMOND & SON; J. T. GLENN; ARNOLD, &
ARNOLD, for plaintiffs in error.

FRY & KING; HILLYER & BROTHER, for defendants.

JACKSON, Judge.

This was a bill filed by Mrs. Zimmerman and her son (who was a minor when the sale took place, but has since attained his majority,) to set aside and annul a conveyance made by their trustee, Plumb, to one White.

White, as agent of Kent & Company, was in Georgia endeavoring to collect a debt that Zimmerman, and Verdery, his partner, owed Kent & Company, and purchased of Plumb, trustee, certain property of Mrs. Zimmerman and her son, George. The trust deed gave the trustee the right to sell by direction of Mrs. Zimmerman, and Mrs. Zimmerman gave the direction. White gave \$4,000 00 for the land to Plumb, or agreed to do it; Plumb took Zimmerman & Verdery's note therefor, and White got it right back, if he ever paid it over at all to Plumb, and paid it over to Kent & Company, his New York principals.

1, 2. Mrs. Zimmerman insists that the sale is void because it was made to pay her husband's debts, and she asks that it be set aside. The jury found that it was made for that purpose, and the evidence, we think, abundantly sustains the finding. Such being the fact found, the law is plain: Code, section 1783; 54 *Georgia Reports*, 543. The deed should have been set aside so far as Mrs. Zimmerman was concerned. How is it with the son's half? The trust deed gave him half at his majority, but at the time of the sale he was a minor, though he is of age now. Clearly it was the trustee's duty to protect him—to preserve his property for him: Code, section 2326. Instead of doing so he permitted the father of the boy to sell his real estate and turn it into a note on himself and partner, to give them a *line of credit* with Kent & Company, promised them by White. Zimmerman, the father, and his partner,

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Verdery, were in failing circumstances then. They could not carry on their business without this line of credit, and this trustee preserved this trust estate for this minor by selling the *corpus*—real estate—and taking their note, without security, for the proceeds! What sort of title did White get? If he were an innocent purchaser for value, without knowledge of the circumstances, inasmuch as the deed gave the trustee the right to sell by direction of Mrs. Zimmerman, and she gave the direction, he got good title freed from the trust; but if he had full knowledge of all the facts, he partook of the breach of trust of the trustee and got no title: Code, section 2329. Did he know all about the condition of Zimmerman & Verdery? Why, he was the agent for Kent & Company to collect their debt against that firm; he agreed to procure them the *line of credit*; he made the whole bargain; he was the prime mover, the author and finisher of the whole business, taking the title to the land, paying the money out, if any was paid, seeing the note duly made by Zimmerman & Verdery, taking the money back from them, and handing it over to Kent & Company. He knew all about it, and bought the trust estate to collect the money for his principals, and succeeded in his object. So, we dare say, the jury thought; so, we think, the evidence required them to think; and so we are constrained by the same evidence also to think. We think, therefore, that the whole sale is void, the verdict right, and the judgment overruling the motion for a new trial right.

3. In respect to the admission of Clark's testimony, we have to say that the fact that objection to it was made is not certified by the court below. It appears in the brief of evidence, and the brief of evidence was agreed to by counsel, but not the fact that any part was objected to. But even if it had been agreed to by counsel, the court below has the right to be heard on what he ruled, and he has not certified to us that he ruled in this evidence over objection of counsel. Besides, the evidence to sustain the verdict is ample, leaving out Clark's testimony, and if this ground were properly certified by the judge, it could not avail to secure a new trial.

The Ordinary of Floyd County *vs.* Smith *et al.*

In addition to all this, it may be added that the objection is made to all his evidence, without specifying any particular part. Some of it was clearly legal. In view of the whole case, we are satisfied with the verdict and the refusal to grant a new trial, and will not interfere.

Judgment affirmed.

THE ORDINARY OF FLOYD COUNTY, for use, plaintiff in error, *vs.* CHARLES H. SMITH *et al.*, defendants in error.

Whether this action was relieved from the operation of the statute of limitations of 1869 depended upon proof of fraud in the guardian in the management of his ward's estate, and that question having been fairly submitted to the jury and a verdict returned in the negative, this court will not interfere.

Guardian and ward. Statute of limitations. New trial. Before Judge McCUTCHEON. Floyd Superior Court. January Adjourned Term, 1876.

Reported in the decision.

E. C. KINNEBREW, for plaintiff in error.

SMITH & BRANHAM; R. R. HARRIS, by Z. D. HARRISON, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants on a guardian's bond, alleging as a breach thereof, the mismanagement of the ward's estate by the guardian, who was appointed in December, 1858. The defendants pleaded the statute of limitations of 1869, in bar of the plaintiff's right to recover. The plaintiff insisted that she was not barred, because the defendant, as her guardian, had acted fraudulently and corruptly in the management of her estate, entrusted to him as her guardian; that he deceived her by

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telling her, in 1865, that he had invested \$1,500 00 of her money in his hands in Confederate bonds, when such investment was never made, and that she did not discover such deception until the year 1873. On the trial of the case the jury, under the charge of the court, found a verdict in favor of the defendants. The plaintiff made a motion for a new trial on the various grounds therein stated, which was overruled by the court, and the plaintiff excepted.

The main question in this case was whether the plaintiff's right to recover was barred by the act of 1869. The plaintiff's right of action was clearly barred by that act, unless the evidence showed that the defendant had acted fraudulently and corruptly in the management of the trust estate in his hands; that question was fairly submitted to the jury, under the charge of the court, and they found a verdict in favor of the defendant. The question of fraud or no fraud, on the part of the defendant, in the management of the trust estate, as guardian, was a question for the jury, under the evidence, and they having found that issue in favor of the defendant, we will not interfere to disturb their verdict, the more especially as the presiding judge, before whom the case was tried, was satisfied with it.

Let the judgment of the court below be affirmed.

**GEORGE P. THOMAS & COMPANY, plaintiffs in error, *vs.*
GEORGE G. CRAWFORD, trustee, defendant in error.**

1. A bequest to George G. Crawford of certain property "to be held by him in trust for the following purposes, to-wit: the rents, issues and profits of the same to be paid over by him annually to William G. Howard during his lifetime, and at his death, the *corpus* of said property to be turned over by the said trustee to the children of the said William G. Howard, should he leave any children surviving him, and in the event of his death without leaving any child or children, then it is my will that said property shall be given to Margaret R. Crawford, if she is alive, and if she be dead, then to go to her children," with discretionary power in the trustee to sell any part of the property during the trust, and to reinvest "as in his judgment shall

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be for the benefit of said trust estate," with option to make returns or not as he chooses, is a valid, subsisting, executory trust, and the legal title to the *corpus* of the estate remains in the trustee to keep the *corpus* secure for the contingent remaindermen, to ascertain who they would be, and to divide the estate among them when they were ascertained, on the happening of the contingencies contemplated by the testatrix.

2. The possession of the land by Howard, with the understanding between him and the executor that he was to receive the rents, issues, and profits thereof in discharge of the legacy due him under the will, did not, by the assent of the executor, divest the legal title of the trustee to the *corpus*, so as to subject the *corpus* to be levied on and sold for the life of Howard. Howard still held only the usufruct, not liable to levy and sale, but subject, if at all, only to Howard's debts by proceeding in equity.

Wills. Estates. Trusts. Levy and sale. Before Judge BARTLETT. Morgan Superior Court. March Term, 1876.

Reported in the opinion.

SEABORN REESE, for plaintiffs in error.

MCHENRY & MCHENRY; J. T. GLENN, for defendant.

JACKSON, Judge.

Thomas & Company levied a *fi. fa.* upon a tract of land as the property of Howard for life. It was claimed by Crawford, as trustee, under the will of Mrs. Jessup. By that will, the rents, issues and profits were to be paid by Crawford to Howard, but the *corpus* was to be preserved to go to Howard's children, should he leave any; and if he left no children, then to the children of Mrs. Crawford. Crawford, who was executor as well as trustee, by the will, put Howard in possession of the land to use the rents, issues and profits thereof in discharge of the legacy due him under the will. The court charged the jury that the life estate of Howard was not subject to levy and sale, and the jury found accordingly, and the single question presented for us to review is, was this charge right under the will of Mrs. Jessup and the possession of Howard? The testatrix bequeathed the property to Crawford with these controlling words in the third item of the will:

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"To be held by him in trust for the following purposes, to-wit: the rents, issues and profits of the same to be paid over by him, annually, to William G. Howard, during his lifetime, and at his death the *corpus* of said property to be turned over by the said trustee to the children of said William G. Howard, should he leave any children surviving him, and in the event of his death without leaving any child or children, then it is my will that said property shall be given to Margaret R. Crawford, if she is alive, and if she be dead, then to go to her children." By the fourth item of the will power is vested in the trustee to sell any part of the property and to reinvest as in his judgment shall be for the benefit of the trust estate, with option to make returns or not as he chooses.

1. Was this trust executed or executory? The Code defines the two in section 2313. If anything remained to be done by the trustee, "either to secure the property, to ascertain the objects of the trust, or to distribute according to a specified mode, or some other act, to do which requires him to retain the legal estate," it is, by the Code, an executory trust. In this case, it seems to us that the legal title should have been retained by the trustee to secure the property for those in remainder, to ascertain the objects of the trust at Howard's death, and then to distribute, to divide, the estate among his children, if he left any, and if he left none, to divide it among Mrs. Crawford's children, should she also be dead. To preserve this property secure for these contingent remainders, to ascertain who were entitled, to divide among them by the direction of the will, are certainly acts, duties, devolved upon the trustee which he could not forego, and which he could not do if he parted with the legal title. Without going into the many cases cited, the Code, we think, is enough to construe this will and determine that the trust is executory; if so, this estate cannot be sold by levy and sale at sheriff's sale: See, also, Perry on Trusts, 305, *et seq.*; 2 Kelly, 319; 3 *Ibid.*, 346.

2. This case is unlike *Gray vs. Obear*, 54 Georgia Reports, 235. There nothing was to be done but to preserve the es-

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tate for Gray—no contingent remainders, no objects of the trust to be ascertained or particular distribution to be made. But it is argued that Howard was put in possession, in the language of the witness, "with the understanding that he was to receive the rents, issues and profits thereof in discharge of the legacy due him under the will," and that thereby the executor assented to the legacy, and title to the *corpus* for life vested in Howard. We think that Howard took to hold only for the easier use of the rents and profits; that the assent of the executor could not, under the facts here, give him any greater estate than the will gave him; that the will gave him only the usufruct; and that the title, the legal title, still remained in Crawford, to the *corpus*, to preserve it for the contingent remaindermen, and to divide it among them when ascertained who they were. In view of the whole case, we think that the life-interest of Howard is an equitable interest only, which cannot be reached by levy and sale, and therefore we affirm the judgment.

Judgment affirmed.

JOHN G. BROWN, trustee, plaintiff in error, *vs.* J. L. WARREN *et al.*, survivors, defendants in error.

(JACKSON, Judge, having been of counsel, did not preside.)

1. Where personal property was exposed for sale under an execution from the circuit court of the United States, in lots, levies made thereon immediately after each lot was bid off by the sheriff, under an execution from a state court against a third person, were invalid, and this invalidity was not cured by the agreement of the plaintiffs in the *f. fa.* from the United States court that they would become the purchasers of all the property, and consider it all levied on. Such agreement was without legal consideration.
2. The verdict was required by the testimony, notwithstanding the alleged errors in the rulings of the court.

Execution. Levy and sale. Before Judge HILL. Houston Superior Court. May Term, 1876.

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To the report in the decision it is only necessary to add the following statement:

George H. White and his father, John G. White, lived together on a certain plantation ; each spoke of it as his, and the evidence as to which was the real owner was conflicting. George H. purchased from Lathrop & Company, at various times, supplies necessary for the place, and drew on them for money with which to pay for mules, etc., purchased from others. All the trading was done in his own name, and Lathrop & Company did not recognize said John G. in any of their transactions. The debt thus created, was reduced to judgment, and the *fi. fa.* levied on certain property, much of which was paid for with the money advanced as aforesaid. George H. White was in possession of such property, and claimed to be the owner thereof when the levy was made.

C. C. DUNCAN ; S. HALL, for plaintiff in error.

WARREN & GRICE ; B. M. DAVIS ; LANIER & ANDERSON, HILL & HARRIS, for defendants.

WARNER, Chief Justice.

This was a claim case, on the trial of which, the jury, under the charge of the court, found a verdict in favor of the claimants. A motion was made for a new trial on the various grounds therein stated, which was overruled by the court, and the plaintiff in *fi. fa.* excepted.

It appears from the evidence in the record, that the plaintiff's *fi. fa.*, which was levied on the property in controversy, issued on a judgment obtained against John G. White in February, 1868. It further appears from the evidence that an execution issuing from a judgment obtained in the fifth circuit court of the United States, on the 12th of November, 1870, in favor of Lathrop & Company, assignees, against George H. White, was levied on the property in dispute by the United States marshal, on the 2d of October, 1871, and sold by him as the property of said George H. White, on the

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2d of January, 1872, and purchased by Lathrop & Company for the sum of \$4,848 69, which amount they received from the United States marshal on the 17th of January, 1872. It also appears from the evidence that when the property levied on by the marshal as aforesaid, was offered for sale by him, that is to say, when he had proceeded to sell a small portion of the property, the sheriff of Houston county would immediately levy on the same as the property of John G. White to satisfy the *fi. fa.* in favor of Brown against him. At this stage of the proceedings, Warren, one of the firm of Lathrop & Company, after stating that the sheriff's levies were illegal, and that he would hold him responsible, entered into an agreement with the plaintiff, Brown, and the sheriff, that he would become the purchaser of the property for Lathrop & Company; that he would consider the whole of the property as levied on and let it stay there until to-morrow, and after that they could take possession of the property as it was bid off. Witness waived no rights—waived nothing. The entry of the levy was made on the *fi. fa.* of Brown, the plaintiff, on the property in the hands of the purchasers at the marshal's sale, by the sheriff, on the 3d of January, 1872, the next day after the sale in pursuance of the agreement, as the property of John G. White, and Lathrop & Company claimed it. From the evidence in the record, George H. White was in possession of the property at the time of the levy of the *fi. fa.* by the United States marshal, and he had obtained the money with which most of it was purchased from Lathrop & Company, the plaintiffs in the *fi. fa.* under which it was sold.

1. Was the levy made by the sheriff of the plaintiff's *fi. fa.* upon the property in controversy, in the manner and under the circumstances hereinbefore recited, a good and valid levy, in contemplation of the law? In any view that may be taken of the entire transaction, it was an unauthorized and illegal interference with, and obstruction of, the marshal's sale of the property which was in his legal custody, and was being

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sold by him under the legal process of the court under which he was acting: Crocker on Sheriffs, sections 472, 449.

If a sheriff, under the direction of the plaintiff in *fi. fa.*, can be allowed to attend a marshal's sale and levy upon the property sold as soon as it is purchased by a bidder, property would not bring much at marshal's sales, and the same result would follow if marshals were allowed by the law to do the same thing at sheriff's sales; but the law does not allow such things to be done, for the simple reason that it obstructs the due execution of the law by obstructing the legal process of the courts. But it is said that Lathrop & Company agreed that the property should be considered as levied on, and that the entry of the levy on the property by the sheriff was made in pursuance of that agreement. Concede that to be true, and how does it affect the claimants? The only consideration for that agreement was the illegal conduct of the plaintiff in *fi. fa.* and the sheriff; or, in other words, it was the illegal conduct of the plaintiff and sheriff that caused the agreement to have been made, and the claimants waived none of their legal rights when they made it, and the plaintiff in *fi. fa.* cannot complain if they insist upon them in the courts, as they said they would do when they made the agreement.

2. Independently of the illegal levy made on the property in the manner and under the circumstances under which it was made, the evidence in the record is such as to have required the verdict rendered by the jury, notwithstanding the alleged errors in the rulings of the court. Lathrop & Company furnished the money to George H. White with which nearly all the property levied on was purchased or made, and there is certainly no injustice in appropriating the proceeds of the sale of that property to the payment of their judgment debt.

Let the judgment of the court below be affirmed.

Gillespie *vs.* Chastain.

P. R. GILLESPIE, plaintiff in error, *vs.* WILLIAM CHASTAIN, defendant in error.

1. A party in possession of a personal chattel may recover the value thereof from any person who wrongfully dispossesses him of the same.
2. If the person who dispossesses him thus in possession, shall seek to protect himself by purchase at a constable's sale of property of defendant in *f. fa.*, exempt from levy and sale by virtue of having been set apart by the ordinary, such purchaser must show that there was no other property of defendant in *f. fa.* on which a levy could be made, and that affidavit was made by plaintiff in *f. fa.*, before the levy, that the debt upon which the execution was founded was one from which the property set apart was not exempt.

Trover. Levy and sale. Exemption. Before Judge BUCHANAN. Carroll Superior Court. April Term, 1876.

Reported in the opinion.

AUSTIN & HARRIS, by brief, for plaintiff in error.

No appearance for defendant.

JACKSON, Judge.

Gillespie sued Chastain in the justice's court for a cow and calf or the value thereof. The justice rendered judgment for plaintiff. Defendant appealed by *certiorari* to the superior court. That court sustained the *certiorari* and set aside the judgment of the justice ; whereupon the plaintiff appealed to this court by exceptions regularly taken, and the case is before us for review.

The facts are, in substance, that one Roberson had the cow exempted from levy and sale, and then sold her to one Richards for \$25 00, who sold her to the plaintiff for \$30 00. The sale to Richards was made in January, 1875, and was approved in March, 1875, by the ordinary. The plaintiff was in possession of the cow, and while in his possession, it was levied on by an execution against Roberson in favor of defendant, and defendant bought the cow for \$10 00, which,

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after paying costs, was credited on his judgment. The levy was made after the sale from Roberson and wife, but before the approval of the sale by the ordinary. After the sale, the cow was not delivered to the defendant by the constable, but the defendant was told to go to plaintiff and take her, which he did. The court below held that these facts gave the defendant title to the cow, and that plaintiff had none, and reversed the judgment of the justice of the peace, and this is the error complained of.

1. The plaintiff, Gillespie, was in the lawful possession of this cow, and defendant took her out of his possession and sold her. This shows possession in plaintiff, which is evidence of title to personal property, and wrongful conversion by defendant, unless he was protected by the constable's sale, in taking the cow from the plaintiff. Code, section 3027, declares that "mere possession of a chattel, if without title or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession." Was the defendant protected then by the constable's sale?

2. The cow was levied upon and sold as Roberson's property under a *fi. fa.* against him, and in favor of defendant; but the cow had been exempted from levy and sale, Code, section 2027, unless the statute in the next section of the Code were complied with: section 2028. That section provides that when *there is no other property to levy upon but the exemption*, and when the plaintiff, or his agent or attorney, shall make affidavit, that to the best of his knowledge and belief the debt upon which said execution is founded, is one from which the property set apart is not exempt, "it shall be the duty of the officer in whose hands the execution and *affidavit* are placed, to proceed at once to *levy* and sell as though the property had never been set apart." In this case there is no proof at all in the record that the defendant in *fi. fa.*, Roberson did not have other property, and though an affidavit was made by the attorney of the plaintiff in execution, who is the defendant in the case at bar, that to the best of his knowledge

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and belief the debt is not one from which the cow was exempt, yet he does not state how or wherein this cow thus set apart was not exempt from this debt; and the affidavit was not made *before the levy*, but only one day before *the sale*. So that when *the levy* was made, by the express terms of the statute, Code, section 2027, the constable was himself guilty of a trespass, and his sale under that levy could convey no title to the purchaser at it; and when the defendant took this cow under it, from the plaintiff, his conversion was wrongful, and he became liable to pay the value of the cow, he having sold her and pocketed her value. We rest this judgment upon two defects in passing title out of Roberson into defendant by the constable's sale: 1st. There was no evidence that Roberson had not other property; 2d. No affidavit was made *before the levy*. We rather think, too, that if it had been made in time, this affidavit was defective in not setting out what exception, in the constitution or by law, vitiates this homestead; but as the other defects are clear, we forbear to decide this point. If the contest were between the plaintiff here and Roberson and his family as to the title to this cow, then the questions of the assent of the ordinary, and the time when given, and the regularity of the transmission of title from Roberson and wife to plaintiff, would arise, but possession alone in plaintiff gives him title against all the world except those who can show a better one, and this defendant has not done so. We are, therefore, of the opinion that the justice of the peace was right and the superior court wrong, and we reverse the judgment and direct that the superior court dismiss the *certiorari* and confirm the judgment of the justice's court: See Code, section 3027; Hilliard on Torts, 2d volume, 11, 12, 13, note (a); Code, sections 2027, 2028.

Judgment reversed.

Miller *vs.* The Georgia Masonic, etc., Company.

SUE E. K. MILLER, plaintiff in error, *vs.* THE GEORGIA MASONIC MUTUAL LIFE INSURANCE COMPANY, defendant in error.

The by-laws of a masonic insurance company provided that the death of a member was to be made known to the company by the affidavit of two respectable witnesses, the genuineness of which should be vouched for by the secretary of the lodge nearest the place of the decease, in which affidavit should be stated when, where, and how, deceased came to his death, etc.; that this proof should be laid by the president before the board of directors at their next monthly meeting, and upon their decision each member of deceased's class should be assessed \$1 00. M. disappeared in November, 1869. In June, 1871, the board of directors passed a resolution declaring themselves satisfied of his death, and ordering an assessment. There is no evidence to show that the regular proof of death was ever presented: *Held*, that the assessment should be made on those who were members of the company at the date of the aforesaid resolution, and not on such as were members at the time of the disappearance.

Corporations. Insurance. Before Judge HILL. Bibb Superior Court. April Term, 1876.

Reported in the decision.

LANIER & ANDERSON, HILL & HARRIS, for plaintiff in error.

IRVIN & GRESHAM, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover the sum of \$5,000 00, which the plaintiff alleged the defendant was indebted to her by reason of the death of her husband, John B. Miller, who was a member of defendant's company. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the plaintiff for the sum of \$649 00. The plaintiff made a motion for a new trial on the various grounds alleged therein, which was overruled by the court, and the plaintiff excepted.

The main controlling question in this case is, whether the recovery of the plaintiff under the defendant's charter and

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by-laws, should have been based on the assessment of the number of members of Miller's class in November, 1869, the time of his reported disappearance, or whether the assessment should have been made on the number of members of his class in June, 1871, when, by the resolution of the board of directors of defendant the assessment was ordered to be made, the board at that time, being satisfied as to Miller's death. It appears from the evidence in the record, that in June, 1871, when the defendant became satisfied of the death of Miller, and ordered the assessment to be made, there were but six hundred and forty-nine members of his class, although there was a much larger number at the time of his reported disappearance.

By the seventh article of the by-laws of defendant, the death of a member of its company was to be made known to the company by the affidavit of two respectable witnesses, and its genuineness vouched for by the secretary of the lodge nearest the place of the decease, and shall state when, where, and how, deceased came to his death, etc. And it shall be the duty of the president to lay before the board of directors, at their regular monthly meetings, all such proofs of the deaths of members, who shall pass upon the same, and to require each and every member of the class or classes to which the deceased belonged to pay one dollar, etc. The evidence in the record does not show that the death of Miller was proven, as required by the by-laws of the defendant prior to June, 1871, when the assessment was ordered, if it was proved at all at that time. The resolution of the board of directors is as follows: "The case of brother J. B. Miller, supposed to have been murdered at Brunswick, was brought up, and his claim allowed, the board being satisfied as to his death, and assessment ordered." Whether the defendant could have resisted the payment of the plaintiff's claim for the want of the proper proof of Miller's death, if the foregoing action of its board of directors had not been taken, it is not necessary to decide; but even the action of the board of directors does not fix the time of Miller's death. Inasmuch

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as the plaintiff relies on this action of the defendant's board of directors to show its liability to her for the death of Miller, the basis of her recovery should have been the number of members belonging to its company, of Miller's class, liable to be assessed at the time the defendant recognized the death of Miller and ordered the assessment to be made, and not for the number of that class which belonged to its company at the time of the reported disappearance of Miller in November, 1869, the defendant not being satisfied from the evidence then before it (the same not being such as its by-laws required) that he was dead. The defendant is made liable, not because the death of Miller was proved in accordance with the requirements of its by-laws, but because it recognized his death in June, 1871. Although there may have been some errors in the rulings of the court during the progress of the trial, still the verdict is right, under the evidence, and we will not disturb it.

Let the judgment of the court below be affirmed.

ALEXANDER PIPER *et al.*, plaintiffs in error, vs. JAMES A. WADE, administrator, defendant in error.

1. A new note for a less sum than the old note, given in renewal thereof, is presumptive evidence that all differences between the parties were adjusted and settled when such new note was given.
2. Such presumption may be rebutted, but it must be upon clear and satisfactory evidence that both parties agreed and intended that the settlement made when the new note was given, was not final, and that any defense which could have been made to the old note, might still be made to the new one.
3. A request to charge, unauthorized by the evidence, should not be given.
4. Even if any error in charging or refusing to charge had been committed, the verdict should stand, if right in any view of the facts disclosed by the record.

Accord and satisfaction. Presumption. Evidence. Charge of court. New trial. Before Judge CRAWFORD. Troup Superior Court. November Term, 1875.

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Reported in the opinion.

BIGHAM & WHITAKER, for plaintiffs in error.

FERRELL & LONGLEY, for defendant.

JACKSON, Judge.

This was a suit for \$600 00 on a note dated in 1866. The plea of defendant was to the effect that this note was given in renewal of an old *ante-bellum* note, the consideration of which was a negro bought at Wade's intestate's sale; that at the time the new note was given, it was agreed and understood that all defenses to the old note should be allowed to the new one, the latter being given merely to renew the old one. The testimony on this point was conflicting, but very strongly, we think, indicating that there was no such agreement or understanding, the plaintiff positively swearing that there was none, and the defendants admitting that plaintiff did not agree to any such outside contract, but that they did reserve the right to insist on defenses to the old note, and plaintiff knew that they reserved this right. Plaintiff denied that anything of the sort occurred, but that the old note was compromised and the new one given after full settlement of all differences and equities, he insisting on settlement or suit in 1866. Defendants admitted that he did threaten suit.

On this state of facts the court charged to the effect that the presumption of law was that all prior matters and differences were closed up by the new note, and defendants must prove an agreement or understanding between the parties at the time it was given, before they could go behind it to open the settlement. The jury found for the plaintiff; the defendant moved for a new trial on various grounds; it was refused, defendants excepted, and the case is here for review.

The main point, indeed—when the case is stripped of surplusage and repetition and requests to charge not authorized by the issues and the evidence—the only point made by the defendants below, the plaintiffs in error here, is that the court

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erred in charging that unless both sides agreed and understood the contract to be that defenses to the old note should come into the new one, they could not be admitted, but that he ought to have charged that if defendants reserved their rights, whether plaintiff agreed to it or not, they could set them up. We think that the law is with the court. It takes two to make a bargain; and the presumption of law that a new note, for a smaller amount, given for an old one, settled up all equities and differences and disputes about the old note, can only be rebutted by an agreement or mutual understanding that this principle of law was waived.

2. It is not rebutted when one party tells the other I shall insist on my defenses, even if this was done, which is disputed here, and the other says, insist as much as you please, but if you don't settle these old matters I must sue, for I must wind up this estate. All sides admit that Wade, the plaintiff, said this, and it is quite strange if he said it that he should, at the same time, have agreed or hinted that the defendants might make the same defenses to the new as to the old note. This would have been no settlement, but would have left matters as bad as, or worse and more complicated than, before. Nor do we think that the case of *McLendon vs. Wilson, Callaway & Company*, 52 *Georgia Reports*, 42, relied on by counsel for plaintiff in error, decides the contrary. In that case the chief justice, who delivered the opinion, says: "This charge of the court excluded from the consideration of the jury the defendant's evidence as to what he says was the intention and understanding of *the parties*." What parties? Undoubtedly he must mean both, for one side could not make parties. That is precisely what the court below charged in the case at bar, and when this case was put to the jury—the understanding of the parties—not of one, but of both parties. Any other rule would admit parol proof of the intention and understanding of one party to open every settlement made in writing; and in these days, when all parties can swear as witnesses, it would leave the opening of every written bargain at the option of every unprincipled or untruthful party. If

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such a principle had been ruled by any court, we should hesitate to give it our sanction and yield to its authority. This court has never held it. Besides, the plea of defendants makes no such a point. That puts the case upon an agreement and understanding of both parties.

3. Nor do we think that the court erred in refusing the charge of defendants, orally requested, that if plaintiff knew that such was the understanding of defendants he was bound by it, or to use the exact language of the record, "that the understanding of one party known to the other party, may be taken as the intention of the parties." The charge was unauthorized by the evidence. All the testimony is to the effect that plaintiff protested against the agreement, and defendants both prove that he never did or would assent thereto. How could his assent or intention, then, as one of the parties, be inferred in this case to the contrary of what everybody swore he said and did on the settlement?

4. But even if the settlement were opened, the proof wholly fails to show that it was not right. To our minds, in any view of the case disclosed in this record, the verdict of the jury is right, and the judgment must be affirmed. There was no error in striking the plea in respect to the irregularity of the sale of the negro.

Judgment affirmed.

G. E. CRANFORD, administrator, *et al.*, plaintiffs in error, vs.
JAMES P. BREWSTER, ordinary, for use, defendant in error.

1. Where an administrator, who was also the guardian of his intestate's children, charged himself, as guardian, with having received from himself, as administrator, a certain sum in cash, he cannot plead and prove, in defense to an action on his bond as guardian, that the amount so charged as cash was in fact made up of notes on divers persons who were solvent at the time, but had since become insolvent, and that with some of the notes he purchased slaves in his own name in order to save the debts, and that such negroes had become valueless on account of emancipation.

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2. A note dated and due on March 7th, 1861, payable to the guardian individually, was properly excluded, it not being made to appear that it represented a part of the ward's estate, except by the loose statement of the guardian in his return, made in April, 1869, "that it was for the funds belonging to his wards."
3. Evidence to the effect that notes received for by the guardian, as cash, if indeed he received notes, could not have been collected at all if negroes and Confederate money had not been accepted in payment, was properly excluded.

Guardian and ward. Evidence. Before Judge BUCHANAN.
Coweta Superior Court. March Term, 1876.

Reported in the decision.

POWELL & STALLINGS; JOHN S. BIGBY; P. F. SMITH,
for plaintiffs in error.

P. H. BREWSTER, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants on a guardian's bond, alleging a breach thereof by the guardian in the mismanagement of his wards' estate. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the plaintiff for the sum of \$1,600 00. The defendants made a motion for a new trial on the various grounds alleged therein, which was overruled by the court, and the defendants excepted.

1. It appears from the evidence in the record that Alfred Cranford was the administrator of the estate of Morrison W. Burney, deceased, and afterwards was appointed guardian of his children, one of whom was the plaintiff. It also appears that on the 1st of June, 1858, Cranford, as guardian, charged himself as having received from Cranford, administrator of the estate of Burney, the sum of \$8,097 39 in cash, to the one-sixth part of which the plaintiff was entitled, there being six minor children. The defendant sought to defend himself, as guardian, by showing that notwithstanding he had charged himself as having received from the administrator of Burney's estate the sum of \$8,097 39 in cash, that he had the legal

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right to show that it was in notes on divers persons who were then solvent, but had since become insolvent by the results of the war; that with some of the notes he purchased negroes in his own name in order to save the debts, which were lost by emancipation. These defenses, and others of a similar character, the court below ruled out, which is the main ground of error insisted on here. There was no error in the rulings of the court in relation to the foregoing recited points in the case.

2. There was no error in ruling out the note of Parks, payable to Cranford individually, it not being made satisfactorily to appear that it was a part of the wards' estate, except by the loose statement of the guardian in his return, "that it was for the funds belonging to his wards," which return was not made until April, 1869.

3. There was no error in ruling out the testimony of Steed, "that if the Skeen notes had not been collected in negroes, or Confederate money, they could not have been collected at all," the defendant having treated all the notes received from the administrator, if indeed he did receive any notes from him, as so much cash. There is no evidence that the defendant loaned out the money which he received as guardian, in safe hands, for the benefit of his wards, or as to what he did with it. The argument for the plaintiffs in error here is, that if he had loaned it out, the notes would have been no better than those which he held as administrator, which were solvent when he received them, but which were lost by the results of the war, and therefore he ought not to be in any worse condition than if he had loaned out the money and taken notes good at the time therefor. The reply is, that the law does not recognize any such protection for guardians as that, and the courts can only afford them protection when they act in accordance with the law which regulates their conduct and duties. In view of the facts as disclosed in the record there was no error in overruling the motion for a new trial on the several grounds therein set forth.

Let the judgment of the court below be affirmed.

Harris et al. vs. Visscher et al.

**S. W. J. HARRIS et al., administrators, plaintiffs in error, vs.
D. W. VISSCHER et al., defendants in error.**

Where each partner being the head of a family, has applied for and obtained a homestead in the partnership land, the same being assigned to them severally in separate parcels, a prior creditor of the partnership cannot, on reducing the debt to judgment, enforce the judgment over the homestead right, his debt being one contracted since the adoption of the present constitution.

Partnership. Homestead. Before Judge HILL. Houston Superior Court. June Term, 1876.

Reported in the opinion.

DUNCAN & MILLER; HALL, LOFTON & BARTLETT; B. M. DAVIS, for plaintiffs in error.

W. S. WALLACE, for defendants.

BLECKLEY, Judge.

D. W. & J. G. Visscher were copartners under that name and style when they acquired title to the land now in controversy, and so continued until after they contracted the debt sought to be collected. The deed conveying the land to them was taken in the copartnership name, and the title stood thus when the debt was contracted. The creditor gave credit to the firm upon the faith of this property. The copartnership business included, among other things, the cultivation and use of this land as a farm or plantation. A part of the debt was contracted in 1871, and a part in 1873. Suit thereon was brought in May, and judgment was rendered in December, 1875. Before suit was commenced, that is, in January, 1874, the land in question was partitioned by mutual consent of the partners, each of them taking a deed from the firm for a separate parcel. Each then proceeded to have his parcel secured to him as a homestead under the constitution and the Code, sections 2002, 2003. The applications were regular, the necessary proceedings were had, under the statute, and the

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ordinary's approval was given on the 20th day of January, 1874. The homesteads thus set apart covered all the effects the debtors owned in this state, as partners or otherwise. They had a large claim due to the firm in Alabama, but it does not appear that it was collectible; so that, both as a partnership and as individuals, they were, perhaps, practically insolvent. Each of them was the head of a family, and both were residents of this state. After obtaining judgment against the partnership for his debt, the creditor had his execution levied upon both homesteads, as the property of the firm. Each partner asserted his homestead right by affidavit, and the jury, under the charge of the court, found the property not subject to the execution. The creditor alleging error in the charge and in refusing certain requests to charge, brought the case here for review. The general question presented for our decision is, whether the homestead right, under the circumstances, will screen the property from levy and sale for a debt of the partnership.

Prior to the Code, realty conveyed to and held by a firm belonged to the members as tenants in common : 19 *Georgia Reports*, 14. It is not absolutely certain that the Code changed this rule, by declaring, in section 1887, that a partnership "may arise from a joint ownership, use and enjoyment of the profits of undivided property, real or personal;" for this language may mean, simply, that partnership may thus exist as to the business carried on, and not that it will or must exist, also, as to the property used in the business. In the present case we understand the evidence as indicating that the land was purchased with partnership funds, and we have no doubt that, in equity, at least, it would and ought to be treated as partnership assets. For the purposes of the present decision, we deal with it as such, legally as well as equitably. Thus treating it, we could find authority for ruling the question before us either way. Some of the cases holding partnership property exempt are to be met with in 37 N. Y., 350 ; 67 N. C., 140 ; 8 Nat. Bank Reg., 409 ; 11 *Ibid.*, 114. Some that assert the negative are reported in 101 Mass., 105 ; 9

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Kansas, 30; 44 Penn., 442; 6 Nat. Bank Reg. 400; 10 *Ibid.*, 145; 12 *Ibid.*, 49; 13 *Ibid.*, 295; 3 Cent. Law Journal, 672. If we felt at liberty to follow the main drift of adjudicated cases in other jurisdictions, we should probably coincide with the authorities last cited, but we do not. It is our duty to expound the homestead provision in the constitution of Georgia, according to its true intent and meaning, and we are reasonably certain that it was the purpose of the framers of that instrument to afford means for arresting the forcible collection of debts of any and all kinds (except those specially enumerated) out of any and all property of the debtor or debtors, not in excess of the homestead allowance. The words of the provision are as follows: "Each head of a family, or guardian, or trustee, of a family of minor children, shall be entitled to a homestead of realty to the value of \$2,000 00 in specie, and personal property to the value of \$1,000 00 in specie, both to be valued at the time they are set apart. And no court or ministerial officer in this state, shall ever have jurisdiction, or authority, to enforce *any* judgment, decree, or execution against said property so set apart—including such improvements as may be made thereon from time to time—except for taxes, money borrowed or expended in the improvement of the homestead, or for the purchase money of the same, and for labor done thereon, or material furnished therefor, or removal of encumbrances thereon. And it shall be the duty of the general assembly, as early as practicable, to provide by law, for the setting apart and valuation of said property, and to enact laws for the full and complete protection and security of the same to the sole use and benefit of said families as aforesaid." Whether we look alone to this broad and sweeping language, or advert, in aid of interpretation, to the public history of the times that brought it into our fundamental law, we are forced to the conviction that HOMESTEAD was intended to be among the most wide-reaching and sacred things in the constitution.

A court that administers the system fairly and faithfully, must consider the laws of partnership that conflict with it,

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modified or repealed by its adoption. They are to bend to it, and not it to them. Difficulties of administration there may be, but with the ample machinery of our law for moulding remedies and adjusting every variety of equitable, as well as legal, rights, the most formidable of these difficulties may be met and overcome. Partnership is but a relation; it is not a person—it is not a legal being; the real owners of partnership property are the partners: 19 *Georgia Reports*, 84. Upon the score of abstract justice, the obligation to discharge partnership debts is no stronger than the obligation to pay individual debts. And upon the score of humanity, the family of a partner, not otherwise provided for, can urge an equal claim to shelter, food and raiment, with the family of an individual debtor. The creditor comes as creditor. He has no title. The whole title was in the two debtors. They have divided the property in a manner satisfactory to themselves. They made the division before the creditor acquired a legal lien. To baffle him by a claim of homestead looks hard; but is it harder upon a partnership creditor to lose his money than upon any other creditor? The law allows debtors to claim homesteads and defy their creditors. Courts can in no case administer a higher justice than that of the law. The law is master, and judges are only its ministers and servants. No servant may presume to be greater than his master.

Judgment affirmed.

P. M. SHEIBLEY, plaintiff in error, *vs.* DANIEL P. HILL,
administrator, for use, defendant in error.

1. In a suit between an administrator, who sues for the use of another, and the defendant, the latter is a competent witness to testify to the identity of a paper alleged to have been sold by the administrator at public sale and bought and paid for, for defendant. His testimony should be excluded only as to transactions between the intestate and defendant.

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2. When a promissory note, or other instrument in writing, is sold at administrator's sale as insolvent paper, the maker thereof may, by an agent, purchase the same with the administrator's consent, and if the administrator receive the purchase money and thus execute the contract of sale, his consent will be inferred, and the title of the estate thereto will pass, and the administrator cannot recover thereon.
3. A charge, unsupported by any evidence, should not be given to the jury.

Administrators and executors. Witness. Charge of court.
Before Judge UNDERWOOD. Floyd Superior Court. January Term, 1876.

Reported in the opinion.

R. R. HARRIS; SMITH & BRANHAM, for plaintiff in error.

R. D. HARVEY; FORSYTH & REESE; ALEXANDER & WRIGHT, for defendant.

JACKSON, Judge.

This was a suit brought by D. P. Hill, administrator on the estate of Joseph Davis, deceased, for the use of Elizabeth Davis, against Sheibley, on the following instrument:

"Received, Rome, Georgia, August 13th, 1876, of Doctor Joseph Davis, \$500 00, to be appropriated on joint account to buying property in the city of Rome, or in case of no investment, to be returned."

The defendant pleaded that he had bought the paper by an agent at the sale thereof by Hill, administrator, the same having been sold by Hill as insolvent paper at administrator's sale, and the title having been in the estate; and that he was in bankruptcy; and that in the lifetime of Davis, he had paid him in tobacco. The plaintiff, the usee in the suit, contended that she had got the paper from the father of Joseph Davis, to whom Joseph had given it, and who had given it to her; and the testimony of the father was that his son had given it to him to keep, as rather appears from his evidence, and that he had given it to his son's wife, who is Elizabeth Davis, the usee, after the death of Joseph Davis, his son.

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There was some evidence of payment in tobacco, and it was clear that some paper on Sheibley, and for \$500 00, called a note, was sold by Hill, administrator, as insolvent paper, and bought by one Goodman for Sheibley; but Hill did not have it with him, and it was not delivered to the purchaser, and Hill could not fully identify it as the paper sold. Mrs. Davis swore that she gave it, among other papers of deceased, to Hill, and afterwards got it back. The jury, under the charge of the court, found for the plaintiff; a motion was made for a new trial, it was refused, and error is assigned on that refusal upon several grounds.

1. The defendant was offered as a witness, and his testimony was rejected by the court. We think that, as to the contract between him and Joseph Davis, or any transaction touching it between him and Joseph Davis, the latter being dead, he was incompetent, because the reason on which the statute excluding him is founded is that the other party to the contract is dead and cannot confront him. But he was offered here, among other things, to show the identity of the paper sued on with the paper sold and bought at the administrator's sale. That was a matter between him and the administrator—a sale by the administrator to him, and as to that transaction, we think that he was competent. Observe that this suit is only nominally the administrator's. If he recover, the recovery is for the use of Mrs. Davis, and the estate will be no better off; so that part of the statute which excludes the other party from swearing when *the administrator is a party*, does not apply. The administrator is no party here in the sense of the statute: Code, section 3854.

2. If this paper was sold by the administrator and paid for by defendant, all title in the estate was gone, and the identity of the paper was a vital thing to be proven, and we think that the defendant ought to have been allowed to show it. Whether the maker of a note or other obligation could purchase it at administrator's sale was not made a question before us; but if it had been, we think when the administrator consents to the sale and puts up the paper and receives and keeps

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the money, it is quite clear that the purchase can be made; nor do we wish to be understood to rule that it could not be so bought by the maker in any case when fairly put up and fairly purchased as the highest and best bidder at public sale.

3. We think, also, that the court was wrong in charging the jury, *in this case*, that "an equitable assignment exists where one party, in due course of trade, purchases from another, for a valuable consideration, an instrument not negotiable, and it is delivered to the purchaser," inasmuch as we are unable to find in the record any evidence to support such a charge. On the contrary, the facts in the case at bar all turn upon a gift to Davis' father by Davis, apparently merely to keep the paper, and then a gift to Mrs. Davis by her father-in-law; all of which appear to us to show that the title, really, never, *bona fide* and for value, passed out of Joseph Davis, deceased, but that it remained in his estate, and the administrator could sell it. The plea of bankruptcy was proven by the record of the adjudication, but it was not insisted upon before us, probably because if the debt was owing at all it partook of the nature of a trust debt. On the other grounds we must award a new trial.

Judgment reversed.

ELIZABETH BOOHER, plaintiff in error, *vs.* EDMUND H. WORRILL, defendant in error.

1. Transactions between husband and wife, to the prejudice of his creditors, are to be scanned closely, and their *bona fides* must be clearly established.
2. A conveyance by husband to wife, made pending suit against him, and only a few days before the rendition of judgment, and leaving him nothing out of which payment of the judgment can be coerced, is, *prima facie*, fraudulent.
3. Where such conveyance purports to be for value, and the consideration set up is a debt from him to her, the actual existence of the debt must be shown; and this is not done by proving that she owned certain real estate, and that at the time of executing the conveyance there was an accounting for rents, she claiming and he admitting that the rents of her property had

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- been collected by him and not paid over, but the actual truth of such claim and admission not being in any way proven on the trial.
4. The charge need not be scrutinized if the verdict is clearly right.
5. Mistake of a witness is immaterial where its correction ought to make no difference in the result.

Debtor and creditor. Husband and wife. Fraud. New trial. Before Judge CRAWFORD. Muscogee Superior Court. November Term, 1875.

On May 31st, 1872, Worrill recovered a judgment against David L. Booher and Milo Booher, on a note dated September 30th, 1868, and due at two years, for \$2,000 00. The execution based upon this judgment was levied upon an undivided half-interest in a certain part of lot one hundred and seventy, as the property of D. L. Booher. A claim thereto was interposed by Elizabeth Booher. Upon the issue thus formed, the evidence made, in brief, this case :

Until May 21st, 1872, the title to the property levied on was in David L. Booher. On that day, his wife, the claimant, presented an account for \$6,000 00 for rents of her property, which she alleged had been collected by him and not paid over. Thereupon he conveyed to her the property in dispute, subject to a mortgage in favor of Robert W. Burdell, for \$3,500 00, and a judgment in favor of Alfred J. Young, for about \$700 00, at a valuation of \$3,000 00, and the aforesaid account was credited accordingly. It was further agreed that if Booher should pay off the aforesaid mortgage and judgment, then said conveyance should be taken by his wife in full settlement of her claim for rents misappropriated. This conveyance stripped Booher of the last of his property. The object of the mortgage to Burdell was to raise money with which to pay off the debt to Worrill. Burdell, upon being thus secured, indorsed Booher's note for \$3,500 00, to fall due one year thereafter. The note and mortgage were made November 25th, 1871. The latter tried to discount this paper, but failed. He twice offered it to Worrill's attorney, upon condition that indulgence should be granted for

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two years, but it was refused. The note was then returned and the mortgage canceled. The Young judgment was paid off, thus leaving, as insisted by claimant, an unencumbered title to the property in dispute in her.

On August 25th, 1869, Booher conveyed to claimant, in consideration of natural love and affection, his residence and lot and store-house, occupied by F. W. Andrews. In 1870, he sold a lot and store-house to one Illges, for \$7,000 00 in cash.

The account for rents collected and not paid over to her, presented by claimant, was as follows:

" Received rent of store 141, for 18 months, at \$66 00 per month.	\$1,200 00
" " " 117, " " " " \$100 00 " "	1,800 00
" for dwelling house from N. J. Bussey.	600 00
" previous to the above from Harrison, A. L., for store 117	2,400 00
	<hr/>
	\$6,000 00."

In 1871, Booher, as trustee, paid city tax on property valued at \$17,500 00; in 1872, on property valued at \$18,000 00.

N. J. Bussey testified that he occupied the house known as the residence of D. L. Booher in the year 1869.

The jury found the property subject. The claimant moved for a new trial because of error in the charge of the court, not material here; because of mistake in the evidence of Bussey, and because the verdict was contrary to the evidence.

In support of the second ground, the statement of the witness alluded to was read, on the hearing of the motion for a new trial, to the effect that, upon examination he had ascertained that he lived on the Booher place from October, 1869, to October, 1870. Also, the affidavit of claimant's attorney to the effect that this mistake was used most deleteriously to his client's case in the argument before the jury, in this, that the account for rents misappropriated, presented by claimant against her husband, and by which they settled, contained an item for rent of dwelling-house collected from Bussey, \$600, whilst the evidence showed that the latter had only occupied the house six weeks after the title was conveyed to claimant.

The motion was overruled and claimant excepted.

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R. J. MOSES, for plaintiff in error.

PEABODY & BRANNON; BLANDFORD & GARRARD, for defendant.

BLECKLEY, Judge.

1. Where man and wife are acting together, on the same side of a question of property, they are under temptation to do themselves more than justice. What is secured to the one is apt to be shared by the other. With respect to enjoyment, however it may be as to title, neither is a stranger to the other's fortune. Contracts between them which retain in the family property that would otherwise go to satisfy honest creditors, are to be subjected to strict scrutiny—a vigilant judicial police. When a creditor challenges such a contract for fraud, slight evidence will change the *onus*, and cast on the conjugal pair the duty of manifesting the genuineness and good faith of the transaction by such evidence as will satisfy, or ought to satisfy, an honest jury.

2. Here we have a conveyance made by the husband to his wife, pending the creditor's suit, and only ten days before judgment. The property conveyed was worth several thousand dollars, and the evidence indicates that it was all the debtor had left. He stripped himself of the last and only means of making voluntary payment; and if the conveyance were to stand, a coercive collection of the debt would, doubtless, be impossible. With these *indicia* of fraud, there is a *prima facie* case, and the burden of meeting and explaining it is upon the claimant.

3. And what is the explanation offered? Chiefly the acts and declarations of the parties themselves at the time of the transaction which stands impeached. The deed purports to have been made for a valuable consideration. The wife had real estate capable of yielding rent. She made a large claim upon her husband for rents collected and not paid over. He admitted that the claim was just. An account was made

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out and receipted, and the deed was executed and delivered. By special contract, reduced to writing, the deed was to be in part payment of the account if the property should not be disencumbered by the husband, and in full payment if it were disencumbered. The main encumbrance treated about, was a mortgage intended to be used to raise money to pay off this creditor, but which was not so used, the effort to do so proving fruitless. And, thereupon, the mortgage itself was offered to the creditor, on condition that he would grant indulgence for two years. These terms being rejected, the mortgage was allowed to drop and go for nothing, and thus the wife's title was made good, and the creditor left wholly unprovided for. Now, to put bottom in all this, the actual existence of a debt for rents collected by the husband for the wife, and not paid over, is indispensable. Yet, no witness testifies to the collection of a single dollar. The whole matter stands on what the parties themselves said and did. The wife claimed—the husband admitted—the account was made out and receipted—the deed was made and delivered. If the husband had, in fact, made collections of rents, to the amount of thousands of dollars, this must have been susceptible of proof. Those who paid the money could have been called to testify, and even the parties themselves were competent witnesses. But no attempt was made to establish any payment to the husband; no witness was examined on the subject, and no excuse was given why witnesses were not produced, not even why the claimant or her husband was not interrogated. The debt was wholly unproved; and its real existence was the vital question, as was ruled in this same case, at July term, 1875, 55 *Georgia Reports*, 332.

2. To scrutinize the charge of the court complained of would be fruitless. Whether the charge was correct or not, the case could have had no other right result, on the evidence before the jury, than the one arrived at.

3. Equally immaterial is it whether the witness, Dr. Bussey, made a mistake in his evidence or not. The proposed correction of the mistake would still leave the radical infirmity

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of the claimant's case unremedied. There was no effort to prove by Dr. Bussey that he ever paid any rent to the claimant's husband, and it is not shown that he intended to testify to that fact on the trial, or that he would or could testify to it now. Besides, even a clearly material mistake by a witness seems not to be a favored ground for new trial: 25 *Georgia Reports*, 182; 37 *Ibid.*, 48; 15 *Ibid.*, 550; 54 *Ibid.*, 635; *Josey vs. Stapleton*, July term, 1876.

Judgment affirmed.

THE MEMPHIS BRANCH RAILROAD COMPANY, plaintiff in error, *vs.* JAMES B. SULLIVAN, defendant in error.

THE MEMPHIS BRANCH RAILROAD COMPANY, plaintiff in error, *vs.* ALBIN OMBERG, defendant in error.

1. A subscriber to shares in a corporation contracts with reference to the charter; and the number of shares to be subscribed, or the whole capital stock necessary to do the contemplated business, constitutes an important element in the contract. A man might agree to make one of ten to raise \$1,000 00, and still might refuse to be one of ten to raise \$500 00. The latter sum might, in his judgment, be wholly inadequate to accomplish the purpose of his subscription, and to subscribe in such a case would be to throw away his money.
2. If the sum fixed by the charter had been subscribed, and yet subscriptions had been released so as to reduce the capital largely and materially, without the consent of the subscriber, the effect would be the same as if the stock released had never been subscribed. A mere nominal subscription, to fulfil the letter and break the spirit of the contract, is no substantial compliance with the charter, and when released because it was nominal, it becomes equivalent to no subscription *ab initio*.
3. Whether an amendment to a charter be material or not is a question of law for the court, and should not be left to the jury; but when its evident purpose is to legalize previous illegal proceedings, and its effect is to reduce the capital stock at the option of the corporation, and the verdict is in favor of the party asserting its materiality, this court will not interfere.
4. If a subscriber acquiesce in the progress of the work by payment of his subscription, assessed or otherwise, he cannot afterwards object, either to the failure originally to get subscribers to the whole stock, or to a material amendment of the charter; but the fact that he merely pays his assess-

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ments to have the route surveyed, is not sufficient to show such acquiescence; and where the question of acquiescence has been fairly submitted to the jury and has been passed upon by them, with evidence enough to sustain the verdict, this court will not interfere. This latter fact distinguishes this case from the case of *May vs. The Memphis Branch Railroad Company*, 48 Georgia Reports, 109.

Corporations. Contracts. Stock. Before Judge McCUTCHEON. Floyd Superior Court. January Adjourned Term, 1876.

Reported in the opinion.

N. J. HAMMOND, attorney general; DABNEY & FOUCHE; SMITH & BRANHAM; C. A. THORNWELL, for plaintiff in error.

WRIGHT & FEATHERSTON, for defendants.

JACKSON, Judge.

This was a suit brought on several assessments of stock subscribed by Sullivan for the purpose of building a railroad from Rome to the Alabama line, and to connect with certain roads in that state. It appears from the record that the charter required a subscription of \$500,000 00 before it was operative; that this sum was not subscribed originally and was afterwards reduced still more, one subscription, a mere nominal one, for \$250,000 00 having been released by the company, and even with that counted, it is clear that the whole subscription never reached \$500,000 00. The charter was amended, legalizing certain acts of the company and authorizing it, in effect, to go on with the work with \$100,000 00 of stock subscribed. Sullivan paid up three assessments, but for a survey of the route and other preliminary objects only. Suit was brought against Sullivan for the balance of his subscription which was assessed and which he had refused to pay. The jury, under the charge of the court, found for defendant; the railroad company moved for a new trial, it was refused, and error is assigned upon this refusal.

The questions made are: 1st. Whether a subscriber to stock

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of a corporation, chartered for an enterprise, is bound to pay his assessments unless the whole stock be subscribed. 2d. Whether, even if the whole had been subscribed originally, a large part merely nominally and which was afterwards released, the subscriber would be bound to pay assessments. 3d. Whether an amendment to the charter authorizing the company to proceed with a less sum than the whole amount required to be subscribed, is so material as to release the subscriber from his subscription, if done without his assent. And, 4th. Whether the facts proven authorized, or rather required, the jury to find that the subscriber had acquiesced in the failure of the procurement of the original sum fixed in the charter to be subscribed, or in its reduction by the release of certain nominal subscribers, or in the alteration of the charter, though material.

1. In respect to the first point, it appears to us that when one agrees to pay so much for an enterprise, how much it will take to complete it, is a most important question. There can be no doubt that he subscribes on condition that the charter is complied with; that instrument forms part, and an important part, of his contract; the law of the corporation made the terms upon which he agrees to pay; and the amount of valid subscriptions made for the common enterprise is most material. One might be willing to be one of ten men to raise \$1,000 00, but not one of ten to raise \$500 00 for a given purpose; \$1,000 00 might, in his judgment, be the least sum that could accomplish the object; \$500 00 he might believe could not, and that his subscription in the latter case would be money thrown away. In this very case he might be quite willing to be one of five thousand share-holders at \$100 00 each, believing that the road, a good substantial road, could not be built for a dime less than \$500,000 00; but he might think it folly to venture on such an enterprise with \$100,000, and would not subscribe a cent for it, because it would waste his money for nothing. And so we find the authorities to be: 6 Pick., 23; 10 *Ibid.*, 142; 45 Maine, 524; 1 Redfield on Railways, 176, *et seq.*, and cases cited there.

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2. It surely cannot alter the case if a large and material subscription were merely nominal, and was afterwards released because it had always been a sham, and all this had been done without the knowledge and consent of the subscriber, who was thus duped and cheated into his subscription by the sham.

3. In respect to the amendment of the charter, it appears from the record that the court left its materiality to the jury, and this is assigned for error. That amendment was to the effect that the capital stock may be as much as \$500,000 00, but that the company may commence work when \$100,000 00 was subscribed. We think that the materiality of this alteration was a question for the court, and that the judge should not have turned it over to the jury; but as they found it material, of course, if we agree with them, we ought not to interfere with what they did. We do think that the change is material in so far as it would force collections from those who had subscribed only on condition that \$500,000 00 should be subscribed. Besides, it legalized acts done by the directors and stockholders in releasing fictitious subscribers, and otherwise. Taking it altogether, it is such an alteration as materially affects the contract Sullivan made, and the principle ruled in *Winter vs. The Muscogee Railroad Company*, 11 *Georgia Reports*, 438, will apply to this case.

4. Indeed, in the case of *May vs. this railroad company*, 48 *Georgia Reports*, 109, this court held the views above given, and held May bound in that case, because he acquiesced, and only because he acquiesced in what had been done in going on with the work without \$500,000 00 subscribed, in the release of the fictitious stock, and the amendment of the charter. But in the case at bar the question of acquiescence was fairly submitted to the jury; they have found that Sullivan did not acquiesce, and the evidence supports the finding. In May's case May shows no dissent at all, swears to none himself; while, here, Sullivan swears that all those acts complained of were without his knowledge or consent. Indeed, the only evidence at all of acquiescence here is, the fact

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that Sullivan paid three assessments, but *these were all for mere surveys of the work*, and the payment of the assessments for that purpose merely, does not show acquiescence in beginning before the whole amount of stock is subscribed. A survey and payment for it, may be always made to ascertain the practicability of the work before the entire stock is subscribed. See the authorities above cited, especially 6 Pick., 23.

In view of the whole case as disclosed by the record, we think the verdict right, and we affirm the judgment of the court below in sustaining it.

Omberg's case differs from that of Sullivan only in the fact that the former never did pay any assessment either for the main work or the survey; and there is not even that evidence going to show that he acquiesced in the conduct of the company or in the change of the charter.

Judgment affirmed.

JOHN J. HOOD, plaintiff in error, *vs.* DAVID P. POWERS, defendant in error.

Under the Code, section 3339, service is required to be effected at least fifteen days before the first day of the term. If effected on Monday, the fourteenth day, it is so far irregular that a motion made by the defendant, at the appearance term, to dismiss the case for want of due service, ought to be granted; especially where the process bears date more than twenty days before the term, and where there is nothing to show that it was not received by the sheriff more than five days preceding the date of service.

Service. Practice in the Superior Court. Before Judge BUCHANAN. Coweta Superior Court. March Term, 1876

Reported in the opinion.

W. A. TURNER, by JOHN S. BIGBY; A. D. FREEMAN, for plaintiff in error.

J. B. S. DAVIS, for defendant.

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BLECKLEY, Judge.

Declaration was filed December 27th, 1875. Process issued the same day, returnable to March term, 1876, of Coweta superior court. At what time the papers were received by the sheriff for service does not appear. Service, as shown by the official return, was made on the 21st of February. This was Monday, and the term of the court to which the process was returnable commenced on Monday, the 6th of March. Counting time in the usual mode, the service was but fourteen days before the appearance term. At that term, the defendant, by his counsel, moved to dismiss the case for want of legal service, and the motion was denied. As the law stood when the Code took effect, the service would have been sufficient. The act of 1799 (Cobb's Digest, 471,) required service at least twenty days before the term. The act of 1829 reduced the time to seventeen days: *Ibid.*, 472-3. Both these acts required process to issue twenty days before the term. Then came the act of 1856, (pam., p. 136,) which declared that the sheriff should "be allowed, for the purpose of serving all writs or declarations at common law, or bills of equity, five days after the time now fixed by law for filing the same in the clerk's office." As there was no time for filing expressly prescribed, the last day for issuing process, was, of course, the latest day for filing, and might be regarded as the time "fixed by law." Accordingly, it was held by this court, in construing the act of 1856, that the act allowed, for serving declarations at common law, five days after the twentieth day preceding the term: 33 *Georgia Reports*, 146. This interpretation of the act brought its provisions in necessary conflict with the act of 1829, for out of twenty days it would be impossible to allow the sheriff five and still have service seventeen days before the term. It followed that there was a repeal of the act of 1829, *pro tanto*, by implication, and that the only law which remained of force, regulating the time of service, was the act of 1856. While this act was operative, any service was legal, in respect to time, which was compati-

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ble with allowing the sheriff five days, and only five days, after what we usually call "return-day." The necessary inquiry in any case was, did the sheriff serve before the five days allowed him had expired.

In two cases which arose under that act, the question was presented, whether these five days were inclusive or exclusive of the Sunday immediately following the fourth day; and in both it was held that they were exclusive—that is, that the sheriff was entitled to five secular days, skipping, to reach the fifth, from Saturday to Monday: 23 *Georgia Reports*, 49; 33 *Ibid.*, 146. Had the law remained as it was at the time of these two decisions they would have controlled the present case. But the Code (section 3339) changes the law in two respects; it requires the sheriff to serve within five days *after receiving the papers*, and it requires him to serve at least fifteen days before the first day of the term. The former of these provisions is, doubtless, directory, so that service not made within the five days would be good if the other more important provision were complied with, namely, if the time of service were at least fifteen days before the term. Section 3343 makes it the sheriff's duty, in case process is delivered to him too late for service within the time specified, to return the same with an entry stating the fact. This must mean that when it is too late for him to serve full fifteen days before the term, he is not to serve at all. Section 4, paragraph 8, of the Code, declares: "When a number of days is prescribed for the exercise of any privilege or the discharge of any duty, only the first or last day shall be counted; and if the last day shall fall on the Sabbath, another day shall be allowed in the computation." It is easy to see that this section does not qualify that part of section 3339 which requires the service to be consummated at least fifteen days before the term; or if it does, that its operation is to add to, and not subtract from, the number of days specified. There is little probability that, where Sunday intervenes, the Code intended to take a day away from a party and give it to the sheriff. There is no declaration that the sheriff is to have at least five

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days, whereas, the language is express, that the defendant shall have fifteen *at least*. But we confine our judgment in the present case to the special facts before us, and do not wish to be understood as positively deciding anything more than appears in the head-note.

Judgment reversed.

S. P. SMITH, SON & BROTHER, plaintiffs in error, *vs.* W. S. McELWAIN *et al.*, defendants in error.

1. Where a bill alleged, in effect, that a certain agent or general manager was appointed to operate certain iron works, to secure the debts of certain creditors holding liens and mortgages thereon, and that complainants contracted with said agent for supplies to feed the hands and stock necessary to operate the works, and in the contract it was stipulated that a certain quantity of iron was to be delivered to complainants, upon which such supplies were to be advanced by them to the extent of \$25 00 per ton, and the agent was to have the right to sell the iron at any time during five months, and to pay interest for the advance at one per cent. per month, "as said advances were to run said works;" and where it was further alleged that from time to time such supplies were liquidated by note until all these notes were superseded by a contract made May 9th, 1875, by which the said agent and general manager sold to complainants three hundred tons of pig iron at \$32 00 per ton, delivered on board of cars at Rome, Georgia, delivery to commence at once, and the whole three hundred tons to be delivered on or before July 1st, 1875, and where it was alleged that this contract was intended to cover payment in supplies already made before the signing thereof, though its form seemed to contemplate payment in money after delivery of the iron; and where it was also alleged that complainants' advances, beginning November 16th, 1874, and ending July 30th, 1875, amounted to \$8,500 00, besides interest, and that all the creditors interested in said works, and for whose benefit they were operated, knew these facts, and that this iron, so made by these supplies furnished by complainants, was thus sold to them by their agent; and that complainants had only received fifty tons of the iron, and that one hundred and eighty tons thereof, made by the use of complainants' supplies, were at the wharf at Rome, and that the agent and certain creditors, so interested and secured, made parties defendant to the bill, had conspired together to take possession of this iron at the wharf and to prevent complainants from getting possession of the balance of the iron thus due them, and paid for by the supplies which made it, and facts tending to show such fraudulent conspiracy were

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alleged ; and that thus the effort of these defendant creditors was to take the gross product of the said iron works, without paying the operating expenses, though they had full notice and knowledge of the foregoing facts ; and where it was alleged that the agent was insolvent, and the works had suspended, and attachments to large amounts had been sued out in Alabama, where they were located ; that at least one thousand tons of iron had been made since complainants supplied the means to operate, of which complainants had got but forty-eight tons, though entitled to three hundred ; and where, by amendment to said bill, it was averred that repeated assurances and promises were made to complainants by the said agent and his principals that the iron would, in good faith, be delivered or its equivalent paid, some of the said creditor defendants alleging that they had made a good bargain out of the complainants, and meant to hold them to it, and other circumstances were averred going to show fraud and intent to deceive complainants and lull them into false security, which culminated at last in actual seizure of the iron at the wharf ; and where the bill prayed for injunction and a receiver, and relief by account and decree against the agent, and especially his principals, who were thus attempting to defraud complainants : *Held*, that there is equity in the bill, and it should not have been dismissed on demurrer, but be heard fully before a jury on its merits.

2. This case is distinguishable from *Cubbedge & Hazlehurst vs. Adams*, 42 *Georgia Reports*, 124, and the succeeding cases, where it was held that equity would not interfere by injunction unless the complaining creditor had judgment or some subsisting, valid lien on the property ; that here complainants' supplies actually made the iron and entered into the very manufacture thereof, and in consideration thereof, the agent, with the full knowledge of the principals, had sold it to complainants and delivered a part, and should have completed its delivery ; and in this case, too, a mistake in the contract of sale, in respect to the consideration already received, was alleged, and it needed to be rectified to speak the intention of the parties thereto, so that, if the facts alleged be proven on the hearing, equity will decree full relief to complainants against all the defendants interested, in proportion to their respective interests and defaults—relief more adequate and complete than a court of law can well administer : See *Cohen vs. Meyers, Cohen & Company et al.*, 42 *Georgia Reports*, 46.

Injunction. Receiver. Lien. Debtor and creditor. Before Judge UNDERWOOD. Floyd Superior Court. January Term, 1876.

SMITH & BRANHAM, for plaintiffs in error.

DABNEY & FOUCHE, for defendants.

The Eagle and Phenix Manufacturing Company *vs.* Bradford.

JACKSON, judge.

This was a demurrer in equity, and the facts and reasons for our judgment are sufficiently elaborated in the syllabus at the head of the case to understand the views we entertain in regard to it.

Judgment reversed.

**THE EAGLE AND PHENIX MANUFACTURING COMPANY,
plaintiff in error, *vs.* JESSE J. BRADFORD, trustee, defendant
in error.**

1. When original pleadings, process, verdict and judgment are lost, a copy may be established, *instanter*, on motion.
2. That they were not recorded, or that the record cannot be found, is no reason for not establishing the copy.
3. The copy of an official transcript preserved in the office of the clerk of the supreme court, duly certified, is competent and sufficient evidence as to contents, etc.
4. With such high evidence, as a check upon fraud or mistake, the motion may be granted without notice to any one; and notice given to a claimant who is resisting a pending levy, made to satisfy the judgment, is neither aid nor obstacle to the motion.

**Lost papers. Practice in the Superior Court. Records.
Evidence. Before Judge CRAWFORD. Muscogee Superior
Court. November Term, 1875.**

During the November term, 1875, of the superior court of Muscogee county, Bradford, as trustee of the Howard Manufacturing Company, petitioned the court, in substance, as follows:

On February 5th, 1852, Van Leonard, as trustee for said company, commenced his action of covenant against the Water Lot Company of the city of Columbus, and at the November term, 1859, of the superior court, recovered a judgment against said defendant for \$3,033 00, and costs. Van Leonard having died, petitioner has succeeded him as trustee.

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All of the original papers in the said case have been lost, but attached to the petition would be found a correct copy. The defendant has ceased to do business, and there is no one now in office upon whom service can be perfected. An execution, based upon the aforesaid judgment, has been levied upon certain water lots which have been claimed by John J. Grant and the Eagle and Phenix Manufacturing Company. Prayer that the copy of the proceedings had in the aforesaid case be established in lieu of the lost originals. The said claimants are the only persons interested in resisting the establishment of the said copy.

Claimants acknowledged service on the petition.

The Eagle and Phenix Manufacturing Company objected to the motion upon the following grounds:

1st. That a judgment can only be proved by the records of the court, and it is not alleged that the records of said court are lost or destroyed.

2d. That a judgment cannot be established *instante* as against this defendant, it being no party thereto.

3d. That there is no such judgment upon any of the records of this court.

The evidence submitted to the court disclosed the fact that the original papers were lost; that, with the exception of the verdict rendered at the November, term, 1859, none of the proceedings appeared to have been recorded; that the case had been carried to the supreme court, and the copy proposed to be established was certified by the clerk to be a correct copy of the transcript of the record forwarded to that tribunal, and preserved in his office.

The petition was granted and the Eagle and Phenix Manufacturing Company excepted.

PEABODY & BRANNON; JAMES JOHNSON, for plaintiff in error.

R. J. MOSES; M. H. BLANDFORD, for defendant.

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1. The verdict was recorded on the minutes. The original papers were all lost, and if they were ever recorded in the record of writs, etc., the book containing the record was lost also. The originals were office papers, and being lost, were subject to be established, *instanter*, on motion: Code, section 3980.

2. The right to establish depends in nowise upon the previous recording or not recording of the papers, nor upon the preservation or loss of the record. The original papers, whether recorded or not recorded, are office papers; and they are equally so after the loss of the record as before. If they were recorded and the record preserved, there might be little or no use in establishing a copy, by the record or otherwise; but we cannot say that the right to establish, if for the purpose only of keeping the files of the court complete, would not exist.

3. The main case, after judgment was entered up for the plaintiff, was brought to this court by writ of error, and here the judgment was affirmed. The transcript on which this court acted, duly certified, was preserved here in the files, according to law; and on a copy of that transcript, certified by the clerk of this court, the court below acted in arriving at the contents of the lost papers; the same being entire, from the first word in the declaration to the last word in the judgment. This evidence was both competent and sufficient. It is not suggested that any better was attainable.

4. Notice of this motion was not given to the defendant in the judgment. But notice has been held to be not absolutely necessary: 3 *Kelly*, 121. In the absence of notice, great care should be taken, and very conclusive evidence required. Such evidence as was had in this case could be fully trusted; and with it, the danger of fraud or mistake was infinitesimal. That the plaintiff in error, who, it seems, is the claimant of certain property which is under levy by virtue of the *fi. fa.* founded on the lost judgment, was served with notice, neither hin-

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dered nor helped the proceeding. The copy established simply stands in lieu of the lost originals, and any attack which could have been made upon them can be made upon it.

Judgment affirmed.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY, plaintiff in error, *vs.* **HIRAM COX *et ux.*** defendants in error.

Section 2960 of the Code, which prescribes that the husband may recover for *torts* committed on the wife, does not repeal the common law rule of pleading that the wife should be joined in the action. In such suits the husband may join his wife.

Husband and wife. Pleadings. Torts. Before Judge McCUTCHEON. Whitfield Superior Court. October Term, 1875.

Reported in the opinion.

D. A. WALKER; SHEWMATE & WILLIAMSON, by brief, for plaintiff in error.

HANKS & BIVINGS; JOHNSON & McCAMY, for defendants.

JACKSON, Judge.

Cox sued the railroad company for a *tort* on the person of his wife, who was hurt by reason of the crossing of the road not being kept in good condition. In this action he joined his wife as party plaintiff. The company demurred because she was so joined, and the court overruled the demurrer, and the defendant excepted. So that the single question is, does the joinder of the wife vitiate the action in such a case so as to make it the duty of the court to dismiss it. The idea of the plaintiff in error is, that section 2960 of our Code alters

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the rule of pleading of the common law. At common law the husband must join the wife to bring such a suit: 1 Chitty's Pleading, 73. But it is urged that, as by section 2960 of the Code, the right is conferred on the *husband* to sue for a *tort* to the wife, as to a child or servant, and all are grouped in the same section, and apparently put on the same footing, therefore the rule of pleading is changed. It may probably be to the extent that the wife *need not* be joined, and that the husband *may sue alone*; but certainly the rule is not repealed. The pleading at common law is not altered expressly, nor by implication; and the joinder is harmless, if not the correct practice. We rather think the old fashioned way the safer, as no other is furnished by the Code. At all events, it is right, and a good way, and there might be the right of survivorship in the wife, and we affirm the judgment.

Judgment affirmed.

A. H. LEE, plaintiff in error, *vs.* W. W. NELMS, defendant in error.

1. In order for the plaintiff to recover on the basis of triple damages for injury to animals, under section 1445 of the Code, he must sue for triple damages, (expressly remitting or releasing a part when it is necessary to give the county judge jurisdiction,) and must, moreover, allege that the defendant's inclosure was not protected as the law requires.
2. Though for even voluntary *torts* committed by a servant in the prosecution and scope of his business, the master is liable, Code, section 2961, care should be taken not to cast on him responsibility for *torts* of that class without sufficient evidence that the servant committed them in the prosecution and scope of such business; more especially, where the measure of damages may go far beyond compensation for the actual injury, and operate as a penalty.
3. The admissions by a servant of past wrongful acts, are evidence against himself, but cannot be used to charge his master.

Trespass. Pleadings. Damages. Master and servant. Evidence. Principal and agent. Before Judge HALL. Newton Superior Court. March Term, 1876.

Lee vs. Nelms.

Nelms commenced an action of trespass against Lee in the county court of Newton county, by filing the following account:

<i>"A. H. Lee, to W. W. Nelms, Dr.</i>	<i>\$100 00</i>
" To damage done to stock of plaintiff, by the command and permission of defendant, by Jack Lee and John Davis, on the plantation of defendant, during the year 1875, from the 1st of August to the 15th of October, as will appear from the following :	
" 1 black cow with white face, beaten on the back	\$20 00
" 1 dun cow, cut in right flank and hind quarter	10 00
" 1 hog, killed by dogs and by blows from rocks	10 00
" 1 sow, beaten so that she lost her pigs, and her ears cut off	5 00
" 1 hog, beaten and maimed	5 00
" 1 hog, one ear cut off and one torn off	5 00"

The defendant pleaded the general issue, and that no stock was injured on his plantation by his knowledge or consent, except one hog, which was, by agreement between plaintiff and defendant, to be caught with dogs.

The county court rendered judgment for the plaintiff for \$100 00, and the case was carried, by appeal, to the superior court. In the latter tribunal the above account was amended so as to read as follows :

" To damage done to stock of plaintiff, to-wit : 2 cows and 4 hogs, by command and permission of defendant, by Jack Lee and John Davis, defendant's servants, at the time on the plantation of defendant in the year 1875, from the 1st of August to the 15th of October, as will appear from the following :" (Same items as above.)

Plaintiff proved the damage to his stock to have been \$55 00. He testified that he did not know where his stock was injured, but supposed on defendant's place, as they ranged in that direction ; that John Davis told him that he and Jack Lee had hurt witness' stock, and if witness did not keep his stock out of defendant's plantation he would hurt them again ; that Jack Lee told him substantially the same thing. That defendant's fence was not more than three and a half feet high ; that defendant told witness that if he did not keep his stock out of his plantation he would have them killed, even if he

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had to pay for them ; that John Davis and Jack Lee were hired by defendant and working on his plantation.

Plaintiff was corroborated by other testimony as to the damage to his stock, and as to the height of defendant's fence.

J. T. Henderson testified that John Davis swore (presumed on trial in county court) that defendant had told him if any cattle got into his place to rock them out ; that he accordingly did catch one hog of plaintiff's with two dogs, and threw him over the fence, but did not hurt him ; that he and Jack Lee did rock plaintiff's cattle out of defendant's plantation, from time to time, in the summer of 1875.

Davis and Lee testified that they had driven plaintiff's stock off of defendant's place, but had not injured them ; that defendant instructed them not to injure such stock ; to rock them if they got into the swamp, but not to hurt them. The former stated that he and Lee had rocked plaintiff's cattle in the swamp, but had not injured them. The latter denied throwing any rocks at the stock at all.

The defendant testified in substance as follows : Davis and Lee worked on his place as servants. Instructed them to drive off any stock which came on his place without hurting them. If cattle went into the swamp to rock them out, but not to injure them. One of the plaintiff's hogs got into the field and into the swamp, and they could not eject him. Told plaintiff to come over next morning at nine o'clock and help get him out as he did not wish to injure the hog. The plaintiff did not come. The hog was caught with dogs and put out. Never made to plaintiff the observation as to killing his stock as testified to by him. Told him that he thought it would be cheaper for witness to kill his stock and pay for them. The fence around his place is as good as the ordinary fencing in the neighborhood. It is not a lawful fence. Bad fences made bad cattle.

The jury found for the plaintiff \$156 00. The defendant moved for a new trial upon the following, among other grounds, *to-wit* :

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1st. Because the verdict was contrary to the law and the evidence.

2d. Because the verdict of the jury was erroneous in this: the county court in which said suit was originally brought, had no jurisdiction beyond \$100 00, and therefore the amount of said verdict could not have been for more than the jurisdiction of said court.

The court sustained the motion on the last ground, unless plaintiff would remit the excess over \$100 00 found by the jury. The plaintiff complied with this condition and the new trial was refused. To this defendant excepted.

E. F. EDWADRS, for plaintiff in error.

EMMETT WOMACK, for defendant.

BLECKLEY, Judge.

1. The plaintiff below sued for \$100 00 damages, but set out a bill of particulars amounting to much less. The jury gave him more than he claimed—that is, more than \$100 00. The court, on the motion for new trial, disapproved of the excess, but left the verdict to stand for the \$100 00. The suit was brought originally in the county court, and went to the superior court by appeal. The jurisdiction of the county judge, in cases of *tort*, does not extend to more than \$100 00 damages; but where the claim is for more, provision is made for remitting or releasing so much as will reduce it to that sum: Code, section 282. The *tort* sued for, was injury done to certain domestic animals belonging to the plaintiff, but there was no allegation that the defendant's inclosure was not protected by a lawful fence, or that the plaintiff claimed, or that the defendant was liable for, three times the damage. To sustain the action, as founded on the Code, section 1445, some notice should have been given, in the pleadings, of these two matters. The statute is highly penal, and when the large penalty which it prescribes is sought to be recovered, the defendant should be fairly warned by the action that the right

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to have triple damages is asserted. Not less material, is the attack to be made on the sufficiency of his fence. The want of a lawful fence must be alleged and established. In the plaintiff's pleadings, we perceive nothing, whatever, to indicate that he meant to found his action on the Code, and not on the general law. The special conditions to rest it on the Code do not appear. And treating it as founded on the general law, the amount of the verdict, even as modified by the judge, is much too large, being in excess of all the damage sustained.

2. The evidence fixes no *tort* upon the defendant, committed by himself, in person. Granting that he is liable for the wilful as well as the negligent acts of his servants, it is only for such acts as were committed in the prosecution and scope of the master's business. Looking alone to the legal evidence in the record, we should have much difficulty in holding that there is enough to show that the plaintiff's property was injured by the defendant's servants whilst they were acting within the scope of their employment. It seems difficult to tell whether the injury was done whilst the animals were in the defendant's field or not. Care should be taken not to go beyond the evidence, and what is fairly inferrable from it, in fixing the defendant's liability; more especially, if he is to be held accountable for treble damages.

3. As to admissions made by the servants after the injury was done, and so remote in time as not to be part of the *res gestae*, they are not, in this action, to be treated as evidence at all. Though they would be good against the servants who made them, they count for nothing against the master: 53 *Georgia Reports*, 395, 635.

Judgment reversed.

Montgomery *et al.* vs. Robertson.

RUFUS F. MONTGOMERY *et al.*, executors, plaintiffs in error,
vs. WILLIAM F. ROBERTSON, defendant in error.

1. After specific legacies of beds and bedding to certain daughters, a testator gave to his grand-son the following legacy: “\$500 00 in money to be raised out of my estate not yet disposed of, it being in full of an amount of my estate, both real and personal, that I design my grand-son to have. My will also is, that my executors hold my said grand-son’s part in their hands till he becomes twenty-one years of age, then to be paid over to him, but should my grand-son die before he is twenty-one years of age, then his part of my estate, to-wit: the \$500 00, to return to and become a part of my estate, to be equally divided among my children.” In the next item he directed that “all my property not heretofore disposed of, be, at my death, sold to the highest bidder, and that after my grand-son shall receive the \$500 00 willed to him in item fourth of this my will, and after my unmarried daughters, if any, shall be made equal in property to my married daughters, then my will is that my children receive a share of my estate.” The will was proved in 1861. The grand-son attained his majority in 1874 and demanded his legacy. The executors defended by showing, by their own testimony, that they had set apart certain notes in 1862 for the grandson, good and solvent at the time, but that all proved valueless except \$25 00, without their fault; but it appeared that they had not fully settled up the estate and made final distribution thereof:

Held, that under the will, it was the duty of the executors to retain a sufficiency of the estate to pay the grand-son’s legacy at his majority, and though they might have set apart a certain portion thereof for him in 1862, which proved valueless, yet if, at his majority, they had on hand enough of the estate in property or notes on the residuary legatees, themselves among the number, raised from the sale of testator’s property, to pay the grand-son’s legacy, that they were liable therefor.

Administrators and executors. Wills. Legacies. Before
Judge HALL. Newton Superior Court. March Term, 1876.

Reported in the opinion.

TOOMBS SPEERMAN; A. B. SIMS, for plaintiffs in error.

CLARK & PACE, for defendant.

JACKSON, Judge.

Middlebrooks died in 1861, leaving a will, and the Montgomerys his executors. By it he bequeathed to Robertson,

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his grand-son, \$500 00, to be paid to him when he became twenty-one years of age. He attained that age in 1874, and sued for his legacy, by citing the executors to appear before the ordinary and account. From the judgment of the ordinary, an appeal was taken to the superior court, and Robertson recovered his legacy. The Montgomerys moved for a new trial, the court below refused it, they appealed to this court, and the case is before us for review.

By his will, the testator left certain beds and furniture to his daughters, and then, by the fourth item, he gave to Robertson, his grand-son, \$500 00, to be raised out of his estate, it being in full of an amount of his estate, both real and personal, which he designed his grand-son to have; he also willed that his executors *hold* his grand-son's part in their hands till he became twenty-one, and *then* pay it to him; but should he die before twenty-one, then the \$500 00 to return and become a part of his estate, to be equally divided among his children. In the fifth item, he directed that all his property, not heretofore disposed of, be, at his death, sold to the highest bidder, and that *after* his grand-son received his \$500 00 and his daughters their furniture, then all his children were to receive a share of his estate. The executors in 1862 set apart some notes, they answered and swore, for Robertson, sold the property and distributed the estate in part—at least the residuary legatees, of whom there were two, bought at the sale, and there was a sort of understanding that the notes were to be credited upon their shares, or their shares upon the notes they gave at the sale for the things they bought. No final receipts were taken, no refunding bonds, and no final and complete administration was had. The notes set apart for Robertson all proved valueless; but they had not fully administered the estate, and had certain debts due, and owed some themselves to the estate, if they were accountable to Robertson, after they had in good faith set apart his share in notes, and it was all gone without their *laches*. Under this state of facts, the court charged to the effect that the legacy to Robertson was the first charge upon

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the estate, and that though the executors had set apart good notes for him, which had proved valueless, yet, if the estate was not fully administered when these notes proved valueless, and they had other property or notes unadministered, that they were liable. Under this charge the jury found for Robertson, and the sole question is, whether the charge and verdict are right. We think that they are right. Undoubtedly, under the will, these executors were to hold enough of this estate to pay this infant on his attaining his majority; and if they had on hand, unadministered, property enough to pay him, they were bound to do so. He could not demand payment until he was twenty-one. A guardian could not have got it out of their hands for him, if he had had a guardian. They were to hold it and to pay him before they could share the estate among their wives, the same as *themselves* at that time, and the other residuary legatees. They might have distributed, perhaps, but they ought to have taken refunding bonds to answer to this minor's claim. At all events, they had not fully administered the estate; the jury found that they had enough *unadministered* to pay this legacy; the court in the charge put the case there, and certainly it put it fairly for the executors. We think that the charge, as given, cannot be complained of by the executors, and that the refusals to charge otherwise were right, and that the verdict is in accordance with the law and the evidence, and we affirm the judgment.

Judgment affirmed.

FRANCIS A. FROST, plaintiff in error, *vs.* M. A. SCHACKLEFORD *et al.*, administrators, defendants in error.

1. An account in favor of a partnership is not matter to support a bill brought by one of the partners only, where it does not appear on the face of the bill that the other partner is dead, or has parted with his interest. Such an account constitutes no cause of action in favor of the complainant, and there can be no decree thereon.

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2. The *individual* notes of the trustee and of one of the beneficiaries, will not charge the trust estate, although such notes were given for supplies furnished for the benefit of the trust, and although the creditor looked to the trust estate alone for payment. If the bill be founded on the notes and not directly on the account in lieu of which the notes were given, there can be no decree subjecting the trust property; certainly not, where the makers of the notes are both dead and where their representatives are not before the court as parties.

Partnership. Pleadings. Trusts. Before Judge BUCHANAN. Troup Superior Court. May Term, 1876.

Frost filed his bill against Schackleford, Stinson and Wilkerson, as administrators *de bonis non, cum testamento annexo*, upon the estate of John Stinson, deceased, making, in brief, this case:

John Stinson died, disposing of an estate of the value of \$20,000 00 by will, and appointed J. W. Stinson as his executor. The estate was administered in accordance with the directions of the testator. All the property was given to the executor, in trust, for the raising of the children and the support of the widow. The Phillips place was specially set apart for the maintenance and support of the widow and children, during the life of the former, where they were to be provided with everything necessary for their comfort and pleasure. If deemed proper by the executor, he was authorized to sell any part of the estate to carry out this provision. The executor and the widow, N. L. Stinson, took charge of the Phillips place and used it as directed. To make said estate productive, they contracted with complainant for supplies and provisions, as will appear by reference to the account and the two notes hereto attached. These supplies and provisions were used and consumed by N. L. Stinson and her children. They were necessary to the making of a crop on the Phillips place. The crop was made and applied to the benefit of said widow and children. Complainant looked to said estate for the payment of this debt, and therefore he made them both sign said notes. Since the execution of said notes both of the makers have died insolvent. In the year 1875, the defendants were

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qualified as administrators *de bonis non*, etc., on said estate. They refuse to pay said debt and are proceeding to administer and sell the Phillips place without providing for its payment.

Prays that the said place be sold and a sufficient amount of the proceeds applied to the payment of this debt; that the debt be made a charge on said land; that the sale of the Phillips place be, in the meantime, enjoined; that the writ of subpoena issue.

The account referred to amounted to \$251 99, and was headed as follows:

"J. W. Stinson, executor,

In account with Frost & Crenshaw, (now owned by F. A. Frost.)"

One of the notes was dated March 3d, 1872, for \$570 00, payable on October 5th, next, to Francis A. Frost or bearer, and specified that it was for provisions furnished to enable the makers to produce their crops for that year.

The other was dated May 24th, 1873, due one day after date, payable to Frost or bearer, for \$461 91.

Both were signed by J. W. Stinson and N. L. Stinson.

On motion, the bill was dismissed for want of equity, and the complainant excepted.

SPEER & SPEER, for plaintiff in error.

BIGHAM & WHITAKER, for defendants.

BLECKLEY, Judge.

On scrutinizing the bill, we find we cannot reverse the judgment of the court below, dismissing it.

1. The account is in favor of a partnership. Frost is one of the partners, and he sues in his own name. Is the other partner dead, or has he, in some way, parted with his interest? The bill discloses nothing on the subject. The account constitutes no cause of action in favor of Frost. The bill does not show why it belongs to him, or how it came to be

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his. It is not assigned to him. He can have no decree for the money due on it.

2. As to the notes, both makers of them are dead. The representative of neither maker is a party to the bill; and yet the bill is founded on the notes, and not on the consideration for which they were given. The accounts closed up by the notes are not sued on—are not set forth. The supplies furnished for the trust estate are not described with any particularity; the value of the various specific articles is not alleged; and from the bill, it would be impossible to ascertain precisely what the articles were. On their face, the notes are the individual notes of the makers. The trustee did not sign them as trustee. The creditor may have looked to the trust estate for payment; and the trust estate may be liable, but, if so, it is not liable on the notes.

Judgment affirmed.

WILLIAM B. MEEKS, plaintiff in error, vs. THOMAS DEWBERRY, defendant in error.

(BLECKLEY, Judge, was providentially prevented from presiding in this case.)

A contract that "the said Dewberry turns over to the said Meeks one execution against L. G. Chambliss and others, as administrators on the estate of D. H. Ponder; if the said Meeks collects all or any part of the same, he is to pay to the said Dewberry one-half of all he collects on said papers, he, the said Meeks, to pay all costs on said suit, if any accrues to him on said suit," is champertous, especially when the parol proof shows that \$143 00 of the sum collected was paid by Meeks to the attorneys, and that the debtor was in bankruptcy.

Contracts. Champerty. Before Judge HALL. Monroe Superior Court. February Term, 1876.

Reported in the opinion.

CABANISS & TURNER; HAMMOND & BERNER, for plaintiff in error.

Meeks *vs.* Dewberry.

STONE & TURNER, for defendant.

JACKSON, Judge.

This was a suit to recover money collected under a contract to the following effect: That if Meeks collected a *f. fa.* on the administrators of Ponder, placed in his hands by Dewberry, he was to pay half of the amount collected to Dewberry, "*he, the said Meeks, to pay all costs on said suit if any accrues to him on said suit.*" Meeks collected a certain amount of money in the bankrupt court, or from the assignee, and after paying Cabaniss & Turner, attorneys at law, \$143 00 fees, deposited the rest in Lampkin's bank, in Forsyth, which soon afterwards broke, and Dewberry sued Meeks for his half of the amount collected, and, under the charge of the court, the jury found for the plaintiff. The defendant moved for a new trial on various grounds, but relied before us on the point that the contract sued on, and the fact that the defendant in *f. fa.* was a bankrupt, and that attorneys were paid \$143 00, made a clear case of champerty, and therefore that the verdict was contrary to law and evidence.

The question, then, is, was the contract illegal and void because of its being champertous? Our statute, Code, section 2750, declares that a contract against public policy cannot be enforced, and among such contracts it specifies, "contracts of maintenance or champerty." If this contract be champertous, then it cannot be enforced. Is it champertous? Our statutes give no definition of champerty. We must then go to the common law, or statute law of England before the revolution, to find its definition. It is the unlawful maintenance of a suit in consideration of a bargain to have a part of the thing in dispute, or some profit out of it, and the promise to pay the expenses or costs, seems to be essential to constitute it: 4 Blackstone, 135; Chitty on Contracts, 584; Hawkins' Pleas of the Crown, 463. Accordingly, in 54 *Georgia Reports*, 288, in the case of *Moses vs. Bagley & Sewell*, this court held a contract not champertous, because there was no agreement to

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pay costs. Thereby we clearly implied that if there had been such a bargain we would have held differently. Here there is an express promise to pay costs; the thing to be done contemplated a suit, the promise was to maintain the suit free of costs to Dewberry, the defendant in execution was in bankruptcy, and a fee of \$143 00 was actually paid to attorneys at law. We cannot imagine a case of champerty if this be not one, unless it can be taken out of the rule because it was founded on the prosecution of an execution, the final process or end of the suit; but an execution is not the end of the suit, too often in practice—property has to be condemned—claim cases to be tried—contests in bankruptcy to be fought—bills in equity to be filed or defended, and the greater litigation often follows the judgment and *fi. fa.* In this case a suit was contemplated in the contract itself; it seems to have been prosecuted in bankruptcy, and attorneys to have been paid their fees, and we think that the statute, section 2750 of our Code, declares that it shall not be enforced.

Whether the plaintiff could recover upon a count for money had and received, or in such a suit as that, we do not decide: See 7 Porter, 488. We think even that questionable; but this suit is on the contract *alone*.

Let the verdict be set aside and a new trial be granted.

**MARION FULLER, plaintiff in error, *vs.* CHARLES KITCHENS,
defendant in error.**

A negotiable note of the laborer, bought up by the employer after the contract of hiring, is not matter of defense to a summary process for enforcing the laborer's lien, in the absence of any request or encouragement to make the purchase, or of any promise to allow the note as payment or as set off.

**Laborer's lien. Set-off. Before Judge HALL. Newton
Superior Court. March Term, 1876.**

Fuller *vs.* Kitchens.

Marion Fuller employed Charles Kitchens to do certain work for her as a laborer. The work was done, but she declined to pay him therefor. He foreclosed a laborer's lien before the county judge. She filed a counter-affidavit, setting up, among other defenses, a note on defendant which she had purchased after the contract was made but before suit brought. The county judge refused to allow the set-off, and rendered judgment for the plaintiff. The defendant carried the case, by writ of *certiorari*, to the superior court, where the judgment was affirmed. To this ruling defendant excepted.

J. P. SIMS, for plaintiff in error.

E. F. EDWARDS, for defendant.

BLECKLEY, Judge.

A laborer has a general lien upon the property of his employer: Code, section 1974. It is enforceable against personal property in a summary method, execution issuing upon mere affidavit: Section 1991. "If the person defendant in such execution, or any creditor of such defendant, contests the amount or justice of the claim, or the existence of such lien, he may file his affidavit of the fact, setting forth the ground of such denial, which affidavit shall form an issue to be returned to the court and tried as other causes. If only a part of the amount claimed is denied, the amount admitted to be due must be paid before the affidavit shall be received by the officer:" *Ibid.* When a laborer hires to work for his creditor, with no express agreement that the wages are not to be applied to the debt, the law would so apply them. So, if after the hiring, the employer were to make advances in money or property, in the absence of a stipulation to the contrary, such advances would go in reduction or extinguishment of the claim for wages. So, too, would debts of the laborer, bought up by the employer at his request, or with his express consent. In each of these, cases there would be reason to think that the parties contemplated the very result,

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and no other, which we have said would follow. There would be something more than the naked element of set-off; there would be an implied agreement that the wages, in whole or in part, as the case might be, should be satisfied with the matter of the cross-demand. But we think set-off, pure and simple, is not fully within the terms above quoted from the Code. With no special fact to connect the two demands in the mutual contemplation of the parties, it is not apparent that the amount or the justice of the claim for wages, or the existence of a lien therefor, would be affected by the existence of a set-off arising out of transactions wholly disconnected with the labor or the wages : See 23 *Georgia Reports*, 43.

Judgment affirmed.

CARL EPPING, plaintiff in error, *vs.* CORINNE TUNSTALL
et al., defendants in error.

1. A special verdict, upon issues submitted by the court in an equity cause, having found the title to lands to be in certain defendants to the bill, the decree of the chancellor thereon vesting the title in said defendants, is valid and legal. There being no exception to the proceedings during the trial of the cause, but only to the legality of the decree, the presumption is that the law in respect to title to land was fairly submitted to the jury, and they had a right to pass upon the question of title as the main issue submitted to them.
2. Where a younger grantee, sued at law by the holder of the older and better title, goes himself into equity, on the ground that he has made valuable improvements upon the land, and prays for compensation therefor, and the jury, in a special verdict, find that the net amount of wharfage realized by the complainant from the wharves, has been greater than the amount he expended on them, with interest, and that the defendants were unacquainted with the fact that they had any title to the land when the complainant obtained the grant and erected the wharves, though they knew he was erecting the wharves, a decree which denies him further compensation follows the verdict, and is legal and valid.

Equity. Decrees. Verdict. Improvements. Before Judge
TOMPKINS. McIntosh Superior Court. November Ad-
journed Term, 1875.

Epping *vs.* Tunstall.

Reported in the opinion.

JACKSON, LAWTON & BASINGER; L. E. B. DELORME, for plaintiff in error.

RUFUS E. LESTER; W. R. GIGNILLIAT, for defendants.

JACKSON, Judge.

Epping, under the headright laws, Code, section 2364 *et seq.*, granted a parcel of land in the county of McIntosh, in the year 1871, and improved it by the erection of wharves thereon. Two actions of ejectment were brought against him by different claimants, founded, one of them at least, represented by the defendants in error, on an older grant, dated in 1833. Epping filed a bill setting up that he had pursued the headright law and granted the land and improved it at great cost, and that defendants had knowledge of the improvements and stood by and allowed him to go on, and thus defrauded him. The ejectment suits were enjoined and the case was tried on the bill. The jury found a special verdict in response to written questions by the court; on this finding the chancellor made a decree, and the complainant, Epping, excepted to this decree as not authorized by the verdict; not a legal, valid decree thereon; and the sole question for us is, did the verdict authorize the decree? No exception is taken to any of the proceedings before verdict, or to the verdict, but to the decree only.

What is the special verdict? And what the decree? It is necessary only to consider the points in the special verdict, in the view we entertain of the law. They found that the legal title was in the defendants, Henry Yonge and Corinne Tunstall; and that the net amount of wharfage realized by the complainant from the wharves had been greater than the amount he expended on them, with interest; and that the defendants were unacquainted with the fact that they had any title to the land when Epping obtained the grant and erected the wharves, though they knew he was erecting the wharves.

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On this verdict the chancellor decreed that the defendants, Corinne Tunstall and Henry Yonge, recover the land, and that the ejectment suits he enjoined perpetually, etc.

1. We think the decree right. The jury found the title in defendants ; the presumption is that the judge tried the case right and charged the law in respect to title right. So that as to the title the decree is right, unless the defendants were guilty of fraud. Were they ? The jury found that they did not know they had the title to this land when Epping got it and built the wharves ; how then can they be charged with fraud ? Besides, it was Epping who appealed to equity against their title, and in such case he could hardly claim compensation. If the defendants had gone into chancery, then they would have been required to do equity and pay for the improvements at least to the extent of *mesne profits* : 55 *Georgia Reports*, 519.

2. But the jury find that he has received in net wharfage more than enough to pay for the improvements he erected. How then is he hurt at all ? We cannot see. He grants the land which has already been granted and belongs to others, makes improvements thereon, pays himself for the improvements in the rents, issues and profits, has a clear balance left, and yet complains. We think the complaint wholly without foundation.

Judgment affirmed

CYRUS R. WILSON, plaintiff in error, *vs.* FRISBIE, ROBERTS & COMPANY, defendants in error.

1. If, in dealing in "cotton futures," you know your factor or broker has deviated from instructions or from custom by selling out too early, and you, nevertheless, without objection, settle with him in full, by note, for his advances, commissions, etc., you thereby ratify the irregularity, and you cannot, when sued upon the note, urge as a defense to the action, the losses which you sustained by reason of such deviation.
2. Where the account rendered, and used as a basis of settlement, was correct as to the selling price and as to the difference between it and the buy-

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ing price, but contained a clerical error as to the buying price itself, such error, when clearly explained by the evidence, becomes immaterial and constitutes no reason for opening the settlement, as the calculations were made by the correct figures and the error had no influence on the result.

3. If one has health to understand all the material facts that appear upon the face of an account, and does understand them at the time of the settlement, whether from an examination of the account or otherwise, the state of his health, physically, is sufficient for the occasion.
4. A telegram expressed in private cipher may be translated into ordinary language by a witness who knows how to read and render it.

Factors. Principal and agent. Settlement. Contracts. Evidence. Before Judge WRIGHT. Pike Superior Court. October Adjourned Term, 1875.

Frisbie, Roberts & Company brought complaint against Cyrus R. Wilson, on a note dated July 21st, 1873, payable to the order of plaintiffs, due on the 1st of December next thereafter, for \$1,342 91. The defendant pleaded the general issue, and that the note sued on was made under a misapprehension of the facts and for no consideration, in this, that the plaintiffs declared to the defendant that the amount of said note was due to them by reason of losses incurred in the purchase and sale of cotton futures, bought and sold on account of defendant, when, in truth, there were no losses in such transactions, of which fact the defendant was not cognizant at the time he gave said note; that on a fair settlement between the defendant and the plaintiffs, they are indebted to him in the sum of \$1,531 00 for money deposited by him with them as a *bonus* on said transactions in futures; that defendant claims judgment for this amount, with interest from December, 1873.

The evidence presented, in substance, the following facts: The defendant, through Sims & Threlkeld, cotton merchants at Griffin, Georgia, in the fall of 1872, and spring of 1873, engaged in the purchase of cotton for future delivery. The plaintiffs were engaged by Sims & Threlkeld to make the purchases in New York. Four hundred bales of cotton were bought on account of defendant, for delivery in March, April, May and June, 1873, one hundred bales to be delivered each month.

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Cotton declined in value and the plaintiffs sold out the contracts for purchase at a loss. The defendant claimed that they sold contrary to instructions, without authority, etc., thus causing him to lose an amount far larger than otherwise would have been the case. After some negotiations defendant gave his note for the balance claimed against him, intending at the time to pay it. When the note matured he failed to meet it, and hence this suit. His change of intention as to the payment of his obligation was due to the fact that he had ascertained that Sims & Threlkeld had an interest therein, and he thought that they had defrauded him. It was at their instance that he engaged in the speculation. At the time the note was given, and previous thereto, he had been in bad health, but the evidence failed to show such a state of mind as rendered him unable to contract. He then supposed that he was simply agreeing to pay to plaintiffs money which they had advanced on his account, but he had since discovered that Sims & Threlkeld were interested in the note, and that, perhaps, plaintiffs had not acted in as good faith as he supposed. But there was no evidence of the discovery of any new facts as to the conduct of plaintiffs beyond what were known to him at the time the note was given.

One ground upon which defendant sought to open the settlement was that of mistake in the account upon which the same was based, in this, that in the purchase of one hundred bales of cotton on March 3d, 1873, for June delivery, the price was placed at 21 5-16 cents per pound, when, in fact, by the account of purchase and sales previously rendered by plaintiffs to defendant, the price was placed at 20 5-16 cents per pound. The evidence showed that this mistake either resulted from the spreading of the ink making the figure "1" appear to be a "0," or from a clerical error. Notwithstanding this error, the difference between the buying price and the selling price was the same in both accounts, producing the same result. The error was thus wholly immaterial.

The dispatch from plaintiffs to Sims & Threlkeld, informing them of the purchase made on March 3d for June deliv-

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ery, was in cipher. A witness, who understood the cipher, was allowed to translate the same. To this exception was taken.

The jury found for the plaintiffs the amount sued for. The defendant moved for a new trial upon the following grounds:

1st. Because the court erred in refusing to charge the jury as follows: "If they believed from the testimony that there was a mistake in the account rendered, either in the calculation, or for the reason that the cotton had not been sold according to the contract between the parties, and when the account of sales was rendered, if the defendant, from sickness, was physically unable to investigate the same and thus test its accuracy, and without doing so, gave the note sued on, then he would be entitled to have said settlement opened." But in reference to this point, charged, in substance, as follows: That would be the law unless the evidence showed that defendant had been notified before giving said note how the cotton had been sold, and that he had had an opportunity to examine the account as to the mistake, etc. That the defendant's sickness would not affect the matter unless it was of such a character as to render him incapable of transacting such business.

2d. Because the court erred in refusing to charge the jury as follows: "Even if the defendant was physically and mentally able to look into the account, but before he did so gave the note sued upon, relying upon statements of plaintiffs or their agents, that the account was correct, and if you are satisfied, from the evidence, that there were mistakes in said account, then you are authorized to open the settlement."

3d. Because the court erred in charging that if the defendant had full notice that the sales of the contracts for April and June delivery were made in violation of the contract, and with this knowledge, gave his note, he is estopped from claiming damages for such violation, unless he was mentally incapacitated for contracting at the time.

4th. Because the verdict was contrary to the law and the evidence.

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- 5th. Because the court erred in allowing the witness A. W. Jones to interpret the cipher telegram from plaintiffs to Sims & Threlkeld.

The motion was overruled and the defendant excepted.

SPEER & STEWART; R. H. JOHNSON, for plaintiff in error.

BECK & BEEKS, for defendants.

BLECKLEY, Judge.

We see no cause for reversing the judgment below. The parties settled, and a note was given for the balance between them. There, it seems to us, was the natural and proper point for the termination of their disputes, if they had any differences to adjust. After that transaction, all that remained was to pay the note. The clerical error afterwards discovered in the account, was not of the least consequence. It had no influence on the calculations, and, therefore, did not vitiate the result. There was sickness, and that may have prevented a nice scrutiny of the account; but the evidence shows that, from the account, or from some other source, the plaintiff in error, notwithstanding his sickness, had knowledge of all the material facts when he gave the note sued on. He may now think he acted without due preparation, but we think otherwise. He was well enough informed; and his subsequent change of mind, seems due to something that ought to have had no weight. While his purpose was to pay the note, he was on the right path; and, from the facts in the record, we do not hesitate to say that he had no sufficient reason for a "new departure." The evidence admitted by the court to explain the cipher telegram was competent. Unless such communications are to be translated by those who understand the signs and characters in which they are expressed, courts and juries would never be able to arrive at their meaning. If they are to come into court at all, they must speak through an interpreter.

Judgment affirmed.

Bealle *vs.* The Southern Bank of Georgia.

THOMAS F. BEALLE, plaintiff in error, *vs.* **THE SOUTHERN BANK OF GEORGIA**, defendant in error.

THOMAS F. BEALLE, plaintiff in error, *vs.* **THE CITIZENS' MUTUAL LOAN COMPANY**, defendants in error.

The *bona fide* holder of negotiable bonds, payable to bearer, and not due, deposited by the bearer as collateral security for the loan of money, will be protected in his title, even against the true owner, until the borrowed money be paid or he realize thereon to indemnify himself. Section 2139 of the Code must be construed to harmonize with sections 2639, 2785 and 2789, and with universal commercial law; and will be restricted to its very letter, if necessary so to restrict its meaning, in order not to unsettle long established law and usage, especially as the section is awkwardly expressed, ambiguous and uncertain. The whole subject needs legislation.

Negotiable instruments. Title. Notice. Before Judge TOMPKINS. Chatham Superior Court. January Term, 1876.

Reported in the opinion.

JACKSON, LAWTON & BASINGER, for plaintiff in error.

S. YATES LEVY; GEORGE A. MERCER, for defendants.

JACKSON, Judge.

This was an action of trover brought for the recovery of certain bonds of the Savannah and Albany Railroad Company, payable to bearer, and not yet due, with coupons attached. The bonds were deposited with one Bruen by the plaintiff, for safe keeping, with directions to collect the coupons, but without authority to dispose of the bonds or otherwise use them. Bruen borrowed \$1,500 00 from defendant and deposited these bonds as collateral security, representing that he had full right and authority to control them, and concealing Bealle's title. The bank made the loan on the security of the bonds in entire good faith and total ignorance of plaintiff's title. The bonds were nominally \$500 00 each—in the aggregate \$2,500 00, worth eighty cents on the dollar, or \$2,000 00. The plaintiff demanded the bonds, defendant refused to deliver them up, the court charged to the effect that the title

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was in the bank, and the jury found for defendant; the charge was excepted to, and the question is, was the title in the bank, or in the plaintiff. The Code declares that the purchaser, *bona fide*, of a negotiable paper not dishonored, will be protected in *his title*, though the seller had none: Code, section 2639. It also declares that the *bona fide* holder for value, of any negotiable instrument, who receives it before due, and without notice of defect or defense, shall be protected from any defenses except *non est factum*, gambling or immoral or illegal consideration, or fraud in its procurement. In 37 *Georgia Reports*, 66, fraud in the procurement of the note is held to mean *fraud in the holder*, and this was affirmed in 48 *Georgia Reports*, 162. So that this is no longer an open question in this court. It seems, then, clear that the defendant, by section 2633 of our Code, would have been protected, though Bruen had no title, if it had purchased these bonds, and protected in *its title to these bonds*, for they were not due, and were negotiable by being made payable to bearer. It seems clear, too, that the maker of them could not have defeated their collection by the bank, the defendant, unless it, the bank, had procured its title by fraud in itself, for there is no pretence of illegal or immoral consideration, or of *non est factum*; indeed, no contest between the makers and the bank at all. If the bank had purchased the bonds for value, *bona fide*, it would have been protected in *its title* by section 2639, though Bruen had none, and could have collected the money, when due, from the makers, unless it had procured the bonds fraudulently. But the bank did not buy the bonds. It took them only as collateral security, or on pledge, which, perhaps, are equivalent terms. What sort of title did it thus acquire? The Code again informs us that the holder of a note, as collateral security for a debt, stands upon the same footing as the purchaser: Code, section 2788. If the word note in this section is a generic term, embracing all negotiable paper, it would seem to conclude the question in harmony with the general principles of the commercial law in the books everywhere: 4 *Georgia Reports*, 428, 289, *et passim*; 50 *Ibid.*, 508.

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But it is said that section 2139 of the Code, alters or controls these sections, and alters the common law, and commercial law everywhere where the English tongue, at least, is spoken. It is said there that "the receiver in pledge or pawn of promissory notes is such a *bona fide* holder as will protect him under the same circumstances as a purchaser, from the equities between the parties, but not from the true owner, if fraudulently transferred, though without notice to him." What does this mean? It is conceded that it is ambiguous, at least, quite awkwardly expressed. The grammatical construction would be that the pronoun "him" referred to the true owner, as the last noun in the paragraph; and thus the words, "without notice," would refer to the true owner and not to the receiver of the pledge. The words "fraudulently transferred" could then properly receive the construction which this court put upon the words, "fraud in its procurement," in 37 *Georgia Reports*, above quoted, and all the sections of the Code could be made to harmonize, which they cannot otherwise be made to do; that is, the holder must be affected with the fraudulent transfer as with the fraudulent procurement. We admit that such a construction does not appear to us at all clear, or even satisfactory; and the whole subject needs legislation. But if it be held that the holder of such collaterals—bonds payable to *bearer* and due in the far future, transferable on mere delivery—could not be pledged as collateral security by the *bearer*, to whom, on their face, they are payable, it would certainly create a great change in commercial law; it would be at war with other plain and simple provisions of the Code, and we cannot, unless this section absolutely requires this construction, so construe it. By commercial law, such paper collaterally pledged does pass title; by this section, 2139 of our Code, promissory notes are excepted, and only promissory notes. It is better to stick to the letter, even though it be but a thin bark, than to make so great a change until the general assembly shall declare what is the law. In Code, section 2138, other evidences of debt are named as liable to pledge; in this, the very next section, only promissory notes are

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named. There may be significance in this omission. Besides, the reason and spirit of the law, the corner stones of all law, justice and right, require this construction. Bealle put it in the power of Bruen to commit this fraud upon the bank by entrusting to him these negotiable securities, payable to bearer only, with no ear-marks at all upon them by which the true owner could be suspected to be other than Bruen, the bearer of them ; and though he be a sufferer, it is better that he suffer than the bank, because the bank is wholly blameless, while Bealle showed want of judgment, at least, in selecting a dishonest agent. Though both were innocent, he ought to suffer who enabled the dishonest third person to perpetrate the fraud, and such is the law : 4 *Georgia Reports*, 300; 8 *Ibid.*, 430.

In the case against the Citizens' Mutual Loan Company, the bonds had been sold by the bank prior to the demand. This fact can make no difference in the principle decided.

Judgment affirmed.

GEORGIA RAILROAD AND BANKING COMPANY, plaintiff in error, *vs.* FANNIE V. GARR, defendant in error.

1. The right to sue for the homicide of the husband vests in the widow at the death of her husband, and is not divested by the subsequent marriage of the widow.
2. The subsequent marriage of the widow will not change the measure of damages to which she was entitled when her right of action accrued.
3. The evidence being conflicting, and there being evidence sufficient to support the verdict, and the presiding judge being satisfied therewith, this court will not interfere, especially after three successive verdicts for the plaintiff.

Damages. Husband and wife. New trial. Before Judge BARTLETT. Greene Superior Court. September Term, 1875.

Reported in the opinion.

J. A. BILLUPS, for plaintiff in error.

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REESE & REESE; M. W. LEWIS & SON; C. HEARD, for defendant.

JACKSON, Judge.

This was a suit instituted by Fannie V. Garr, when she was Fannie V. Oakes, against the railroad company, for damages for the homicide of her husband. He was an engineer upon the road, and was killed at Union Point, in Greene county. Under the charge of the court, the jury found for the plaintiff something over \$7,000 00. The company moved for a new trial on various grounds set forth in the motion, the presiding judge declined to grant it, and the company brought the case before us, assigning three grounds of error: First. That Mrs. Oakes had intermarried with another man, and was no longer Oakes' widow, and had thus lost her right to recover for his homicide. Second. That if she could recover at all, she could only recover a support, such as he was wont to furnish her, during the four years of her widowhood; and, thirdly, that the verdict was decidedly and strongly against the weight of the testimony, and that the presiding judge should have granted the new trial on this ground.

1. That the widow of Oakes had the right to sue when the suit was commenced is not disputed. The question first made is, did she lose it by her marriage? Suppose that she had inherited a fortune after the beginning of this suit, so that she would no longer have needed to recover the support, or the value of it, of her deceased husband, would she have lost this right of action? Clearly not. If not, does she lose it by marrying another man who now supports her, or ought to do so? If so, she does not lose it by not needing it, but by marrying. Can that be so? We think not. The policy of the law is to encourage marriage; this young widow waited some four years, and then, in no hot haste, but decently, and after a long widowhood, comparatively, married again; ought she to lose a right of action which had vested in her by this second marriage? Not if the policy of the law be to encour-

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age marriage: See Code, section 1697. But if this right vested in her, how else could it get out of her but by the marriage? And if the policy be to encourage marriage, the courts will construe the law, if two constructions can reasonably be put upon it, so as to harmonize with the general policy of the state. Section 2971 of the Code, then, will be so construed as to harmonize with the policy of the state, if practicable. It reads: "A widow, and if no widow, a child or children, may recover for the homicide of the husband or parent," and then it gives the right of survivorship to the children, if the widow dies, and to the remaining children if some of them die. If the legislature had intended the right of action ever to abate, we think they would have said so. If they had intended the widow to lose her right and it to go to the children in case of her marriage, how easy to have said not only that if the widow die the right shall survive to the children, but if she marry again! We hardly think that such an amendment could have passed the legislature. It would have been against their declared policy to encourage marriage, and would have been voted down, we think. At all events, they have not so enacted, and we think that her right remains intact though she should marry. Besides, she is still a mother. She must take care of the child which the record shows her deceased husband left her; the law does not provide that this child, as long as she lives, can ever get a dollar from the company. The child, in the lifetime of the mother, can get at the company for the homicide of the father only through the mother. The child will get at the company in that way, for the second marriage does not extinguish the maternal affection. It could not have been the intention of the legislature that a case should arise in which neither mother nor child should recover on a clear case made, yet such would be the case if the mother lost her right to sue by her second marriage. The statute now makes her property her own; the second husband has no marital rights; and in respect to this recovery she will be, to all intents and purposes, a *feme sole*, a widow still, free from all control of her husband, ex-

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cept, indeed, what affection may prompt. In view of the whole case, we think the statute does not take away her right by marriage again, but it remains in her. The word widow indicates the person, not the state, and is used as synonymous with wife. That was the word used in the act of 1856 from which the Code was taken, and the words are used synonymously, or signifying the same thing, all over the Code.

2. In respect to the measure of damages, we think she also loses nothing for the same reasons. She and the child ought to have the full recovery; if she cannot get it all, the child can get none. Besides, what does it matter with the company to whom it goes, if they owe it. To cut off her right to this support would be to prove that her second husband was equal to the first as a provider, and would lead to inextricable confusion. Besides, this first husband would have been living and providing for her but for the act of the road; and if she has been so fortunate as to get another good man, the road necessitated her doing so by killing the first husband.

3. In respect to the finding being against the evidence, we have but to say that the evidence is conflicting, and that there is enough to sustain the verdict. The question fought was the negligence of the deceased, and that turned upon the speed at which he was running the cars when they reached the switch—whether it was at a rate greater than four miles an hour. Four witnesses swore that it was not at a greater rate; others that it was; the conductor that it was some four and a half miles an hour. If, in the judgment of deceased, he was only running four miles an hour, he was not negligent. Nobody can calculate exactly the rate to run, and it is hard to say a train is running exactly four or five miles per hour, or to engineer it exactly to that rate or this. So of the amount of the verdict. The evidence, we think, averaging it, and allowing interest to be added as part of the damages, may sustain it. There have been three successive verdicts for the plaintiff; and while we will not say that had we been in the jury box we would have rendered either of them, yet the whole policy of the law makes juries the judges of the facts

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of every case, the judges of the credibility of the witnesses, whom to believe and whom to disregard, and when they have uniformly, for three times, thirty-six men of the vicinage in all, passed upon the facts and found the same way, we do not feel at liberty to interfere.

The charge was all that the railroad company could ask; the presiding judge who gave it has approved the finding, and litigation would be endless if, in such a case, we should overthrow the settled rulings of this court, and control his discretion. We must, therefore, affirm the judgment.

Judgment affirmed.

ROBERT C. McALPIN *et al.*, plaintiffs in error, vs. SANDERS W. LEE, defendant in error.

(JACKSON, Judge, having been of counsel, did not preside in this case.)

1. An instrument attested by a subscribing witness, is inadmissible except upon proof of execution by such witness, unless his absence has been satisfactorily accounted for.
2. Where, to ejectment by vendor against vendee, holding under bond, who has made default in payment of purchase money, a third person "who claims the possession and title to the premises against the plaintiff," is made a party defendant, a deed offered by her tending to show title out of the plaintiff, and to explain her possession, is admissible.
3. The fact that the plaintiff had proved his claim for the purchase money in the bankrupt court, as against the estate of the vendee, would not prevent his recovery.

Ejectment. Evidence. Witness. Deed. Bankrupt. Before Judge CLARK. Lee Superior Court. March Term, 1876.

Reported in the opinion.

W. A. HAWKINS, for plaintiffs in error.

R. F. LYON, for defendant.

WARNER, Chief Justice.

This was an action of ejectment brought by the plaintiff, on the demise of Sanders W. Lee, against Richard Roe and Robert

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C. McAlpin, tenant in possession, to recover a certain described tract of land mentioned in the plaintiff's declaration. On the trial of the case, the jury found a verdict in favor of the plaintiff. It appears from the record and bill of exceptions that Lee, the lessor of the plaintiff, claimed title to the land in dispute under a deed executed to him by Mrs. Willoughby, that Lee sold it to Mims, taking his note for the balance of the purchase money due therefor, executing a bond to Mims to make him a title when the purchase money due for the land should be paid. Mims was adjudged a bankrupt, and Lee proved the debt due by Mims for the land in the bankrupt court. When the bond for title was offered in evidence by the plaintiff it had a subscribing witness to it. The defendant objected to its introduction in evidence until its execution had been proved by the subscribing witness. The court overruled the objection and allowed the bond to be proved by the plaintiff, and the defendant excepted.

It also appears from the record, that Julia E. Mims, who claimed possession and title to the land against the plaintiff, was made a party defendant, and on the trial offered in evidence a deed from James Laramore to Alexander Laramore, for the land in dispute for the purpose of showing an outstanding title in another, to-wit: Alexander Laramore, and to show that she claimed under him, which deed was of older date than the deed from Mrs. Willoughby to Lee, and older than her title, under which the plaintiff claimed. The deed so offered in evidence the court rejected, on the ground that she could not dispute the title of the plaintiff, whereupon the defendant excepted. The defendant also requested the court to charge the jury, that if the plaintiff had proved his debt due for the land in the bankrupt court, he could not recover, which request the court refused, and the defendant excepted.

1. The court erred in admitting the bond in evidence without proof of its execution by the subscribing witness, unless his absence had been satisfactorily accounted for.

2. The court also erred in rejecting the deed offered in evidence from James Laramore to Alexander Laramore by

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Julia Mims, one of the defendants, who, as it is recited in the order making her a party defendant, "claims the possession and title to the premises against the plaintiff." Who Julia Mims is the evidence in the record does not inform us, or how or under whom she went into possession of the land. The deed offered was admissible in evidence under the statement of facts disclosed by the record. Whether she went into the possession of the premises in dispute under the plaintiff or under Laramore, the record is silent. The only evidence upon that point is contained in the order making her a party defendant, that she claims the possession and title to the premises *against the plaintiff*, and that being so, she was entitled to introduce the deed for the purpose of showing under whose title she went into possession, and under whom she claimed to hold it if she could have done so.

3. There was no error in the refusal of the court to charge as requested in relation to the plaintiff having proved his debt in the bankrupt court. The proof of the plaintiff's debt in that court did not defeat his legal title to the land if he had one.

Let the judgment of the court below be reversed.

THE CITY BANK OF MACON, plaintiff in error, *vs.* EFFIE KENT, defendant in error.

(JACKSON, Judge, having been of counsel, did not preside in this case.)

1. When an agent, having a power of attorney to collect any and all moneys due or to become due his principal from any source, and especially a certain described claim, and to give, for his principal and in her name, any and all receipts and acquittances necessary or proper on receiving, or in order to receive, any and all such moneys, and also to apply portions of such moneys to debts of the principal, and generally to do and perform any other acts in and about said business that may be deemed necessary or proper, deposits in bank, to the principal's credit, some of the money arising from the claim specially mentioned in the power, and afterwards, during the existence of the agency, draws out the deposit on checks purporting to be signed by the principal, and believed by the officer of the bank to be genuine, the bank is discharged, whether the checks be in fact genuine

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- or not. They are, in effect, receipts and acquittances in the name of the principal.
2. The agency continues so long as the power is not revoked and the business is not withdrawn from the agent's control.
 3. If the authority, in itself, were insufficient, and if ratification by the principal were necessary, ratification could take place after the knowledge by the principal that the money was drawn out by the agent, though she were ignorant that he had used false checks to obtain it. On the question of discharge or no discharge to the bank, the receipt of the money from the bank by the agent would be the act needing ratification, and not the execution of the checks.
 4. Ratification, if requisite, might be inferred from receiving money from the agent with knowledge that he had received it from the bank, or from consenting, with like knowledge, to its use by him or by a borrower from him, the principal being aware that it was her money and drawn in some way from the bank.
 5. Aside from any question of authority, ratification or knowledge, any of the money paid by the bank to the agent, which the latter delivered to the principal, or retained with her consent, or disposed of with her approbation, would be a credit to the bank on the deposit account, unless thus to follow the fund and apply it would violate some peculiar equity.
 6. Receipts in full by principal to agent are evidence tending to prove ratification of all collections, disbursements and appropriations which had taken place when the receipts were given. Such documents are open, however, to explanation, and when explained, what they prove in the end is for the jury to decide, and not for the court.
 7. If checks of various amounts are mixed together without the fault of either party, two being genuine and the rest false, and if the genuine cannot be distinguished from the others by any evidence before the jury, or which the party claiming the benefit of the checks could produce, the jury should not disallow all the checks for want of greater certainty in identification, but should apply the principle of average, or some other, so as to approximate justice. It would certainly be safe to allow the two checks of least amount.
 8. Testimony upon a given question may be satisfactory, though not wholly unimpeached.
 9. In charging the jury how witnesses may be impeached, it is error to specify, as one of the modes, evidence of general bad character, where there is no such evidence in the case. It is also error, to charge, in general terms, that a witness may impeach himself "by confession to infamous conduct, which, if true, would exclude him from respectable society." What respectable society might do, but has not yet done with a person, is not a standard by which to test his credibility.
 10. In a civil case, when evidence is conflicting in respect to a fact set up by the defendant, and the jury are consequently in doubt, they are not obliged, as matter of law, to give the benefit of the doubt to the defendant.

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11. The judge may caution the jury to discriminate the evidence from all other statements before them.
12. Where the action is upon contract, indictments still pending, found by the grand jury after the suit was brought, are not relevant, though the person indicted be a principal witness for defendant, and though the offenses charged be forgery and larceny by the witness in respect to the money constituting the consideration of the debt sued for.
13. When the judge can find no obscurity in the date of an instrument, he may say so, and read the date aloud in the hearing of the jury, the instrument being in evidence.
14. The judge may speak with a witness in an under-tone, in presence of the jury.
15. The judge may ask counsel a pertinent question during the cross-examination of an expert, even though the effect be to put the witness on his guard by disclosing to him a fact which the counsel wished him not to know.
16. When even a party is under cross-examination, the court may exercise a sound discretion in requiring counsel to make the relevancy of his questions apparent.
17. Where there is an order for the separation of the witnesses, exceptions therefrom as to witnesses not parties to the case, are discretionary with the court; and, in this instance, the discretion was not abused, in refusing to make the exception requested.
18. Where counsel, demanding that the whole charge shall be in writing, presents certain written requests to charge, if the requests are given with additions or modifications, these also must be reduced to writing and read to the jury (*provided the counsel requires it*) so that the entire charge, precisely as given, may appear. It is, however, the right of the court to decline to notice any request which wants addition or modification to render it appropriate.
19. The jury having made a verdict, and then dispersed by previous consent of counsel and with leave of the court, it is not proper to poll them when the verdict is afterwards returned and read.
20. Jurors will not be heard by affidavit, to impeach their verdict.
21. If it be error for the court to refuse to hear the motion for new trial read over at the term when the rule *nisi* is granted, that error, unless excepted to *pendente lite*, cannot be examined upon a bill of exceptions sued out after the motion is disposed of at the succeeding term.
22. It is much the better practice for the judge, when a motion for new trial is presented, to settle at once the truth of its recitals; but he is not legally bound to do so, as the motion is mere pleading, and is what the counsel chooses to make it.
23. On the argument of the motion, although the judge may know and announce that some of the recitals are incorrect, he is not legally bound to point out the errors, but may adjudicate upon the motion as he finds it, noting the errors, if he shall think proper, in his final order, or in his certificate to the bill of exceptions.

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24. It is irregular for the judge, in disposing of a motion for new trial, to examine a bailiff, on oath or otherwise, out of the presence of the parties or their counsel, with any view to aiding the judicial mind on a question of fact embraced in the motion.
25. As to those elements of the record which are suggestive of unseemly conflict between counsel and the court, see *12 Georgia Reports*, 330, 316, 317; *18 Ibid.*, 394, 395; *11 Ibid.*, 57, 538, 539, 629, 630, 631; *10 Ibid.*, 409 to 413. A reviewing court, as a general rule, can deal with such matters only by citing that law of courtesy which all members of the profession, whether at the bar or on the bench, may be supposed to recognize and habitually observe, and on breaches of which, when they occur, every tribunal may be deemed competent to decide for itself, and willing to decide justly.

Principal and agent. Ratification. Banks. Evidence. Receipts. Jury. Charge of court. Witness. Practice in the Superior Court. Verdict. New trial. Practice in the Supreme Court. Attorneys. Before Judge HILL. Bibb Superior Court. October Term, 1875.

Effie Kent brought complaint against the City Bank of Macon, on an account containing but one item, as follows:

"May 15th, 1872—To amount of cash deposited in said bank to her credit, \$4,000 00."

The defendant pleaded as follows:

1st. The general issue.

2d. That said deposit was made by Benjamin F. Griggs, who, at the time, held a general power of attorney under the hand and seal of plaintiff, for the management of said money; that said sum has been fully paid out to said attorney, under checks signed by the plaintiff, payable to said attorney or bearer; that such payment is a full discharge of the defendant.

3d. That said power of attorney was exhibited by Griggs to the defendant at the time of making said deposit, and was unrevoked at the time of the payment of the aforesaid checks by the defendant; that such payments, therefore, operated as a full discharge to the defendant.

4th. That after said money was thus paid out to said attorney in fact, he fully accounted with the plaintiff for the same, and the latter ratified the payment to him, and had a complete and final settlement with him as to his liability on account of such money.

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The evidence, which was voluminous, made, in substance, the following case :

Benjamin F. Griggs was the family physician of the plaintiff. His relations with her were of the most intimate character. He attended her husband in his last sickness, and after his death, became her agent for the collection of \$5,000 00 due to her on policy of insurance on the life of the deceased, under the following power of attorney :

"STATE OF GEORGIA—BIBB COUNTY :

" Know all men by these presents, that I, Effie Kent, widow of James M. Kent, deceased, of said county and state, do hereby, in consideration of \$1 00 to me paid, the receipt whereof is hereby acknowledged, do constitute and appoint Dr. Benjamin F. Griggs, also of said county, my true and lawful agent and attorney in fact, for me and in my name, place and stead, to apply for and collect any and all moneys due, or to become due to me, from any source, and especially the amount claimed by me from the Continental Life Insurance Company, of the city of New York, on the policy of said company held by me, insuring the life of the said James M. Kent, now deceased, and to give for me and in my name, any and all receipts or acquittances necessary or proper on receiving, or in order to enable him to receive any and all such moneys, or any part thereof; and also to apply portions of such moneys, after being received by him, to debts due by me, taking receipts therefor, and generally to do and perform any other act or acts in and about my said business that may be deemed necessary or proper. Hereby ratifying whatever my said attorney shall do in the premises by virtue of these presents.

" In testimony whereof, I have hereto set my hand and affixed my seal, this 5th day of April, in the year A. D., 1872.

(Signed)

"EFFIE KENT.

" Signed, sealed and delivered in presence of

" D. W. HAMMOND,

' " R. S. LANIER."

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The plaintiff states that Griggs proposed to attend to this business for her as a brother, charging no compensation therefor; Griggs, on the contrary, asserts that plaintiff requested him to collect the money for her, offering at the same time to allow him for his services one-half the net proceeds after paying all the expenses of collection, etc., out of the fund.

Griggs collected from \$4,900 00 to \$5,000 00 on the policy, \$4,000 00 of which he deposited, on May 23d, 1872, in the name of plaintiff, with the defendant. It is for this sum that the suit is brought. At the time the deposit was made, Griggs showed to the cashier of defendant the above power of attorney, and stated that it was under the authority of such instrument that he was acting. The defendant produced six checks, aggregating \$4,000 00, purporting to have been signed by plaintiff, which were paid by it. These checks were presented by Griggs and the money paid to him. The plaintiff denied that she had signed any of these checks, and upon this point the evidence was distressingly conflicting. But the overwhelming weight of testimony showed that the signatures would have been pronounced by any bank officer as genuine. If the checks were spurious the forgery was so well executed that the most expert would have been deceived. The teller and cashier of defendant both testified emphatically to the fact that when plaintiff came to them for her money, before suit brought, she admitted that she had signed two of the checks, but did not specify which. This the plaintiff denies, and a witness who accompanied her, states that he has no recollection of such admission, though it might have been made.

The defendant further insisted that even though the checks were forgeries, and even though Griggs had no authority to draw the money from bank, yet that plaintiff had ratified his illegal and unauthorized acts in this particular, in receiving all or a portion of the money thus drawn out from him, in authorizing him to lend it to various persons at interest, and in accepting his note for a part thereof, or in receiving payments on such note after she was informed that it was given for a portion of the money thus drawn out of bank. As to

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each of these acts, from which defendant sought to infer ratification, the evidence was very conflicting. Griggs swore that plaintiff knew all about the money's having been drawn from bank, and that she, with such knowledge, received about \$2,000 00 thereof, in addition to the \$900 00 not deposited. This the plaintiff denies. Griggs further stated that plaintiff importuned him to lend out the money for her benefit. This also the plaintiff denies. Griggs further testified that he placed in the hands of Lanier & Anderson, attorneys, a note on himself, payable to the order of plaintiff, for \$1,200 00, dated September 25th, 1872, and due one day after date, which covered an amount loaned to him by the plaintiff after he had settled in full for her insurance money, upon which he was to pay her the interest, and the principal as she might need it from time to time. That this was done with the knowledge and consent of the plaintiff. Whether plaintiff knew at the time this note was placed in the hands of Messrs. Lanier & Anderson by Griggs, that it represented a portion of the money drawn from bank, or even that it had been placed there at all, the evidence is conflicting. But two payments were made on this note, each of \$50 00, and the testimony indicates that even if the plaintiff did not know that this paper represented a portion of her insurance money when the first payment was made, she certainly did at the time of the last. Failing in these grounds of defense, the defendant undertook to show that Griggs had accounted with plaintiff for all of the money thus drawn from bank, and for this purpose introduced the two following receipts:

“ MACON, GA., August 27th, 1872.

“ Received of Dr. Benjamin F. Griggs \$4,900 00, less cer-
tain amounts paid out by him on my account and by my
order, in full of the amount collected by him as my attorney
in fact, from the Continental Life Insurance Company of New
York, on a policy insuring the life of James M. Kent, my
late husband. (Signed) “EFFIE KENT.

“ Witness: H. J. PETER.”

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"MACON, September 11th, 1872.

"Received of Dr. B. F. Griggs \$60 00 in full of balance in his hands as my agent, and in full of all demands of every description I have against him.

(Signed)

"EFFIE KENT."

"Witness: PETER C. SAWYER."

Griggs testified that the first of these receipts was given in full settlement of the amount due by him to plaintiff for moneys collected; that there was then in bank to the credit of plaintiff \$500 00, and he so informed her; that on the 30th of August, at her request, and on her check, he drew the remaining \$500 00 from bank and handed it to her; that she returned him \$200 00 of this amount, with the request that he pay certain bills for her, as she was going to Florida; that he paid the bills, and, on the 16th of September, handed to her a balance of \$60 00, remaining after making the disbursements she requested, and took the receipt last above set forth. (The date of this receipt in the record is September 11th.)

The witnesses to these papers throw no light upon them. They testified as to nothing material except the execution.

Plaintiff stated that she first saw the receipt for \$4,900 00 at Peter's drug store on September 16th, 1872, in presence of Mr. Peter; that she signed it a second time, on the same day, at Griggs' house, in presence of Mr. Sawyer. That Griggs read the receipt to her, on both occasions, as for \$900 00. That she supposed she was signing, on each occasion, the same paper. That he paid her, on the same day, \$60 00 at the train as she was about to leave for Hawkinsville. That she understood her \$4,000 00 to be in bank, and that this receipt was for the disbursement of the \$900 00 never deposited, the balance of which was the \$60 00 paid to her by Griggs at the depot, and which he promised to bring there at the time she signed the receipt.

There were also in evidence, two indictments against Dr. Griggs, found before this suit was brought and still pending,

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one of which charged him with the forgery of one of the aforesaid checks and the other with the larceny after trust delegated of the balance of the money collected from the insurance company after the deposit of the \$4,000 00 in bank.

The jury found for the plaintiff the full amount sued for.

The defendant moved for a new trial upon the following grounds, *to-wit* :

1st. Because the court erred in refusing to allow the defendant to keep Benjamin F. Griggs in the court-room to assist in the management of the defense, under the following circumstances: Before the presentation of plaintiff's case began, defendant's counsel asked the court to have the witnesses separated. Plaintiff's counsel then asked that defendant's witnesses be also excluded. Defendant's counsel replied that the presence of Griggs was essential to them in the conduct of the defense, especially in the examination of the witnesses for the plaintiff; that the testimony in the case would be long and intricate, and the principal actors in the transaction which gave rise to the suit, were the plaintiff and said Griggs; that this testimony conflicted throughout, and that unless the court would allow Griggs to be present during the examination of plaintiff's witnesses, they would withdraw the motion to separate. Plaintiff's counsel then renewed such motion. Defendant's counsel then asked that Griggs be allowed to remain during the examination of plaintiff's witnesses for the reasons already stated, and for the further reason that the officers of defendant knew little or nothing personally about the greater portion of the matter in reference to which the plaintiff and her witnesses would testify. The court excluded all the witnesses in the case except the plaintiff and the cashier of defendant.

2d. Because the court erred in the portion of its charge which was as follows: "The defendant takes on itself the burden of proof that these checks are genuine. The bank, in receiving this deposit, guaranteed that it would keep the same, and only pay it out to the plaintiff, or to some one duly and legally authorized by her to receive it. The fact that the

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signature of the name of plaintiff purports to be her signature, or that it is a good or bad imitation of her signature, will not do; the bank must show to your satisfaction that the signatures are genuine. If the defendant has established the genuineness of these checks by unimpeached testimony, then you will find for the defendant, but if defendant has failed to do so, then you will find for plaintiff on this issue."

3d. Because the court erred in the following portion of its charge: "If these checks are not the genuine checks of the plaintiff, then I charge you that the defendant is not helped by the power of attorney of plaintiff to Griggs. When that \$4,000 00 was placed to the credit of the plaintiff with the defendant, it was placed beyond his control under that power. That power gave him no authority whatever to draw it out."

4th. Because the court erred in the following portion of its charge: "A witness may be impeached by evidence as to his general bad character, and a witness may impeach himself by confession to infamous conduct which, if true, would exclude him from respectable society."

5th. Because the court erred in the following portion of its charge: "The second defense set up by defendant is, that the plaintiff, after knowing all the facts as to the drawing of this money from the bank by Griggs, ratified such withdrawal. If the defendant has proved this to your satisfaction, then you will find the issue for the defendant. But the burden of proof to establish this is on the defendant, and it must show, first, that plaintiff knew the facts as to the deposit of this money in bank and its withdrawal by Griggs on checks purporting to be signed by her; and second, her ratification of such withdrawal after such knowledge. If you find these facts clearly proved, then you will find this issue for the defendant; but if the defendant has failed in establishing, by proof, all or either of these propositions, then you will find the issue for the plaintiff."

6th. Because the court erred in the portion of its charge which was as follows: "Another defense is that Griggs, after the deposit of this money in the bank and his withdrawals of

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it on her checks, and with a full knowledge of these facts by the plaintiff, paid over the full amount so deposited and withdrawn, to her; this is denied by the plaintiff, and the burden of proof is on the defendant to establish it by evidence. If you find these facts proved to your satisfaction, to-wit: that the plaintiff, with a full knowledge of this deposit in bank, and of its withdrawal by Griggs on checks in her name, and that Griggs paid her over this money in satisfaction or part satisfaction of the same, then such payment, to the amount thereof, should be allowed the defendant as a credit on the plaintiff's claim, at the date of such payment; but if the defendant has not established these facts by proof, or if these payments by Griggs were made out of that part of the funds not put in bank, then you will find this issue for the plaintiff."

7th. Because the court erred in charging the jury as follows: "The receipt in evidence, dated August 27th, 1872, does not purport to be in regard to this deposit in bank or its withdrawal from bank, and Griggs, on disbursing the money left out of bank, and on depositing the balance of \$4,000 00 in bank to plaintiff's credit, was entitled to just such a receipt, and her receipt would be, and is, a ratification of his disbursement of the nine hundred and odd dollars, and also a ratification of his deposit of the \$4,000 00 to her credit in bank, and nothing more. It is not evidence that one dollar of the money deposited in bank and drawn out by Griggs, had ever been received by her."

8th. Because the court erred in the following portion of its charge: "If the receipt of September 16th, 1872, you shall find is as to a balance of \$60 00 kept out of this deposit in bank, and the only transaction then had was the payment of the \$60 00, then such receipt, although it expresses to be in full of all demands, can be of no avail to defendant in this case."

9th. Because the court erred in charging as to the note for \$1,200 00 as follows: "Bank checks and promissory notes are not payment until themselves paid. As to the credits on this note, whatever amount of money Griggs paid to the plain-

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tiff out of the money deposited in bank and drawn out by him, and she received, knowing it was such money, then to that extent defendant is entitled to a credit therefor in this case; but if she received it from Griggs without knowing this, then it is a payment with which defendant has nothing to do, and a private matter between her and Griggs, and the burden of proof of payment is on the defendant."

10th. Because the court erred in charging the jury as follows: "Defendant claims that plaintiff admitted to the officers of the bank that she signed two of the checks. In order for the defendant to avail itself of this, it should have shown which two checks were so signed by her, and failing to do this, it is not entitled to a credit therefor."

11th. Because the court erred in refusing to charge as follows: "If the execution of the power of attorney from Effie Kent to Dr. Griggs has been proven, such power of attorney constituted Dr. Griggs the agent of Mrs. Kent in the management of this money. And if Dr. Griggs exhibited the power of attorney to the bank at the time he made the deposit, as evidence of the capacity in which, and authority under which he acted in making the deposit, then the bank was authorized to deal with him, in reference to said money, as the trusted, confidential agent of Mrs. Kent, and if, while so dealing with him, he drew out the money upon checks purporting to have been signed by Mrs. Kent, and the evidence should be conflicting, and the jury in doubt whether such checks were genuine or forged, the jury should give the benefit of such doubt in favor of the bank and against Mrs. Kent."

12th. Because the court erred in refusing to charge as follows: "If the power of attorney from Mrs. Kent to Dr. Griggs is sufficiently proven, it constituted the latter the agent of Mrs. Kent in the management of the money received from the insurance company, not only for its collection and safe keeping, but also for its disbursement as to portions of it; and if, after the collection of this money, Dr. Griggs deposited a portion of it, say \$4,000 00, in the City Bank in the name of Effie Kent, and at the time of doing so exhibited to the bank

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the power of attorney as evidence of the capacity in which, and the authority under which he acted in making said deposit, then the money so deposited was not, by such deposit, removed from the operation and authority of the power of attorney, but the same remained within the terms thereof, and such deposit thereunder was subject to the control of the attorney in fact, Dr. Griggs, while it was not revoked; and if the bank, innocently and without knowledge of any fraud by Dr. Griggs, under these circumstances, and in the absence of contrary instructions, paid the money to him in good faith, and charged up the amount in the deposit book which he presented, believing that he was receiving it for the use and benefit of Effie Kent, and had reason so to believe, then the bank is not liable, even though they had no check from Effie Kent."

13th. Because the court erred in refusing to give the following charge: "The power of attorney from Mrs. Kent to Dr. Griggs constituted him her agent in the management of the money received from the insurance company, not only for its collection and safe keeping, but also for its disbursement as to portions of it; and if, after the collection of this money, Dr. Griggs deposited a portion of it, say \$4,000 00, in the City Bank, in the name of Effie Kent, and at the time of doing so exhibited to the bank the power of attorney which is in evidence, as the authority under and capacity in which he acted in making said deposit, then the bank was authorized to deal with Dr. Griggs, in reference to this money, as the trusted, confidential agent of Mrs. Kent; and if, under these circumstances, the bank paid money to Dr. Griggs under the confidence created by said power of attorney, upon checks purporting to be signed by Mrs. Kent, and apparently signed by her, the bank is not liable, if the payment was made in good faith and charged up on the deposit book presented by Griggs at the time, believing the checks to be genuine, and that the money was being paid to the trusted, confidential agent of Mrs. Kent, for her use or on her order; and if it had good reason so to believe."

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14th. Because the court erred in refusing to give the following charge: "If the jury should find that the checks were not signed by Mrs. Kent, still the bank will not be liable if they should find that she knew that the money was being drawn without her check, and consented to and approved of the same; nor will the bank be liable if the jury should find that Mrs. Kent, with the knowledge that the money had been drawn from the bank without her check, still accepted and used said money, knowing the same to be a portion of the said money in bank; nor will the bank be liable, under these circumstances, if she knew and consented to the use of the money by another party after having been so drawn."

15th. Because the court erred in refusing to give the following charge without qualification: "If the jury should find that the checks were not signed by Mrs. Kent, and that the money was drawn from the bank without her knowledge, still the bank will not be liable if she, after discovering that the money had been so drawn, ratified the act of so drawing said money; if the plaintiff, with the full knowledge that said money had been so drawn without her check, received the same from Dr. Griggs, or approved his disbursement of it, then such acts on her part constituted a ratification by her of the drawing of the money, and she cannot recover."

After charging this the court added the following qualification: "If knowledge proved and payment made; but the burden is on the defendant to show these facts, and the receipt of the 27th of August to Dr. Griggs does not prove either."

16th. Because the court erred in refusing to charge as follows: "The principal cannot ratify in part and repudiate in part, but a ratification of any part will operate as a ratification of the whole; and in this case, if Mrs. Kent has, with a knowledge that the same constituted a portion of the fund in bank drawn out by these checks, received any portion of it from Dr. Griggs, as her agent, it is a ratification as to his right, as her agent, to draw all of it."

17th. Because the court erred in refusing to charge as follows: "If in this case it should appear, by the evidence, that

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Dr. Griggs had illegally drawn this money out of the bank by forged checks, and if it should further appear that Mrs. Kent, knowing this fact, recognized Dr. Griggs as her debtor for the whole or a part thereof, received by her as a settlement of the amount due her, and received his note for such amount, that would constitute a ratification, and plaintiff cannot recover."

18th. Because the court erred in refusing to charge as follows: "It is not necessary that Mrs. Kent should have actually received the note in her hands; but if she directed Dr. Griggs to place the note in the hands of Messrs. Lanier & Anderson for collection, or recognized such note as hers after having been so placed, she thereby recognized Dr. Griggs as her debtor; and if she knew the said note was for the whole or any part of the \$4,000 00 which was in bank and drawn out by Dr. Griggs, and so recognized him as her debtor by receiving said note, and received the same in settlement of the amount due by him on the \$4,000 00 so drawn out by him, that was a ratification by her, and she cannot recover. If she received, through Lanier & Anderson, \$100 00 upon said note, she thereby recognized said note as her property, and also recognized Dr. Griggs as her debtor, and if she knew his debt was for a portion of the \$4,000 00 drawn from the bank, and received said note in settlement of the amount due her on the \$4,000 00, she ratified the drawing, and cannot recover."

19th. Because the court erred in refusing to charge as follows: "If the jury should find that Mrs. Kent received a payment upon a note given by Dr. Griggs, which she knew to be a portion of the \$4,000 00 which was in bank, and which had been drawn out, and which she had received in settlement of the amount due her on the \$4,000 00 deposit, it makes no difference whether or not she knew the exact amount of the note. It is sufficient if she knew it was a note given her by Dr. Griggs for either the whole or a part of the whole \$4,000 00 which was in bank, and which Dr. Griggs had drawn out, she having consented to receive it in settle-

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ment for the same; and if, with this knowledge, she received a payment on the note, she recognized the note and the debt to her by Dr. Griggs, and having so ratified the drawing of the money, she cannot recover."

20th. Because the court erred in refusing to give the following charge, without qualification: "The deposit of this money by Dr. Griggs in the bank did not operate as a revocation of said power of attorney as to that money."

To this the court added the following qualification: "But did deprive him of the right to draw the money out by virtue of it."

21st. Because the court erred in refusing to give the following charge, without qualification: "By the deposit of the money in bank, the power of attorney, which is in evidence, did not become *functus officio* as to that money."

To this the court added the following qualification: "It was of no force over that money so long as it remained in bank, until Mrs. Kent should draw it out. The bank, by a new contract with the plaintiff, had stipulated it should be drawn by her order."

22d. Because the court erred in refusing to give the following charge, without qualification: "An agent, under a power of attorney such as that in evidence, does not part with the right to control a fund when the same has been deposited by him in a bank in the name of his principal, until said deposit has been reported by him to his principal, unless said power of attorney is revoked, or unless the instructions to the agent are to deposit funds when collected."

To this the court added the following qualification: "On such deposit, he parted with the power to draw it out on the forged checks of his principal; and if he drew out on forged checks, then he waived the right to withdraw on his power."

23d. Because the court erred in refusing to give the following charge, without qualification: "If an agent, under a power of attorney such as that in evidence, deposit money collected by him, in a bank, in the name of his principal, in the absence of any instruction or agreement to deposit, said agent has the

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right to withdraw said deposit without the order of the principal, upon return of the evidence of deposit, if the same is done before it is reported to his principal, and before the revocation of the power of attorney."

To this the court added the following qualification: "But he cannot do this on the forged order of his principal. The presentation of such forged order would be a waiver of his right to do so under his power of attorney."

(The remaining grounds of the motion are so qualified by the presiding judge that it is deemed best only to set forth their substance as qualified.)

24th. Because the court erred in instructing the jury, in an emphatic manner, immediately after the defendant's counsel had stated its defense to the jury, as the court was about to adjourn for the day, that although the plaintiff had closed, yet they would probably be occupied several days in hearing the evidence, and it was therefore important that they should give their close attention to the testimony, so as not to be dependent upon the statements of counsel or their fellow-jurors for the evidence; that they had best make up no opinion in the case until they had heard all the testimony, the arguments of counsel and the charge of the court thereon, etc.; that they must keep in their minds the distinction between the facts as they were actually given in by the witnesses and the statements of counsel as to the facts they expected to prove; that they were only to consider the evidence as delivered before them.

Defendant's counsel submits that these instructions were calculated to prejudice their case, and were wholly uncalled for as they had plainly said to the jury that their statement simply covered facts which they expected to prove.

25th. Because the court erred in refusing to allow defendant's counsel to ask the plaintiff certain questions which were proposed, unless they would disclose their object, although such counsel stated in their place that they would, in due time, show the relevancy, and that they expected to contradict the witness by her own testimony, and begged the court



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to remember that they were upon the cross-examination of the plaintiff, and that to disclose their object would be to defeat it.

26th. Because the court erred in reading aloud to the jury the date, as he understood it, of a certain letter from plaintiff to Lanier & Anderson, it being a disputed point as to how said date should be read.

(The court states that there was no obscurity about such date; that it was plainly written September 23d, 1872.)

27th. Because the court erred in conversing with H. L. Jewett, a witness upon the stand, after his examination was through, in an undertone.

As stated in the motion, the manner of the court in this conversation, was such as to prejudice the defendant's case before the jury; but as qualified by the court, it amounted to nothing more than is above set forth.

28th. Because the court erred in this: When Plant, plaintiff's witness, was testifying as an expert to the effect that, in his opinion, the checks were not signed by the same person who had made the signatures admitted to be genuine, defendant's counsel exhibited to him two signatures of plaintiff which had been proven to be genuine, but which the witness had not previously seen, and asked him, as an expert, if the two signatures were made by the same party who had made the other signatures, admitted to be genuine; the witness hesitated and declined to express an opinion. When pressed by counsel to give his opinion, he said: "In my opinion they may have been made by the same party or they might not have been." When pressed for a more definite answer, after hesitation he said: "I should be inclined to doubt if they were made by the same person." At this point the court interrupted the examination with this question: Mr. Bacon, are not these two signatures about which you are now questioning Mr. Plant, two signatures which have already been proved to be genuine? Counsel replied in the affirmative, when the witness expressed the opinion that upon close inspection he believed they were genuine.

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(The judge states that he never was aware of the fact, until it appeared in the motion for new trial, that Mr. Plant was not informed that the two signatures presented to him had been proved to be genuine; that he simply interfered to prevent a pointless cross-examination.)

29th. Because the court erred in this: Counsel for defendant had requested the court to charge the jury in writing. The court added verbal qualifications to certain written requests, when counsel asked if such additions were in writing. Upon the first occasion the court answered that it was not, and immediately reduced the same to writing. Upon the second, the court answered that the qualification was not in writing, and asked counsel if they wished to make a point on this fact, because if they did they could have the benefit of the exception; if not the court would put it in writing. Receiving no response, the court reduced the same to writing.

(The pith of this ground lay in the manner of the court in its remarks to counsel. But the judge, in his comments, denies the objectionable features set forth.)

30th. Because the verdict was not the voluntary and uncoerced finding of the jury, but was determined by a device unauthorized by the law, which a majority of the jury, who were in favor of finding for the defendant, were forced to adopt to relieve themselves from great bodily suffering, and to escape imminent and great danger to their health, if not to their lives; all of which is shown by the affidavits of seven of the jurors in said case, hereto attached.

(The presiding judge states that if any of the jury were sick, or uncomfortable or desired better accommodations while kept together, he knew nothing of it; that they were brought into the court-room at eight o'clock in the morning and at three o'clock in the afternoon, at which times they appeared to be healthy and comfortable; that he has examined the bailiff, who had the jury in charge, on oath, and he states that he never knew or heard of any complaint of sickness among them while under his charge. The judge further states that he has no knowledge of the mode by which the jury arrived

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at their finding, except from the affidavits of the jurors which he declines to consider.)

31st. Because the court erred in refusing to allow the jury to be polled upon the ground that they had been allowed to disperse by consent, after the finding of the verdict and before the delivery of the same into court.

The motion was overruled and the defendant excepted upon each of the grounds therein set forth.

The defendant also presents the following exceptions:

1st. The case was tried at the April term, 1875. The defendant, at the same term, moved for a new trial, and, in open court, asked the judge to hear the motion read and to certify to the allegations therein contained as being true, while the occurrences were fresh in his mind. The judge refused, without assigning any reason therefor, to hear the motion read or to pass upon the truth of the facts set forth in the various grounds, but ordered that the motion be set down for a hearing at the succeeding term of the court. To all of which defendant excepted at the succeeding term of the court. No exceptions *pendente lite* were filed.

2d. At the next term of the court, when said motion was read, the judge stated that he would not certify to the correctness of many of the allegations therein contained. Counsel for defendant requested that before proceeding to argue the motion, the judge would point out the allegations which were erroneous. The judge refused to grant the request, or to give information as to where the errors would be found and in what they consisted, and ordered counsel to proceed with the argument. To all of which the defendant excepted.

3d. As appears from the comments of the judge in his order overruling the motion, he examined, *ex parte*, the bailiff having the jury in charge, as to the truth of some of the allegations in the motion contained, without giving notice to counsel for defendant, in order to enable them to contradict the statements of said bailiff. To this defendant also excepted.

Error is assigned upon each of the aforesaid grounds of exception.

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A. O. BACON; IRVIN & GRESHAM; WASHINGTON DES-
SAU, for plaintiff in error.

JOHN B. WEEMS; S. HALL; W. A. LOFTON; C. B.
WOOTEN; HILL & HARRIS; R. F. LYON, for defendant.

BLECKLEY, Judge.

The power of attorney is very broad. It confers authority to pay out as well as to collect. The agency did not expire when the money was deposited in bank to the credit of the principal. Besides the evidence on the face of the power itself, there are other facts in the record going to show that the agency continued in force. We think the officers of the bank were well justified in treating checks as genuine, which were presented by the agent, bearing the name of his principal. Such checks were sufficient receipts and acquittances for the money paid out by the bank upon them. Besides, the element of ratification is in the case; and while it does not go directly to the checks, it does go to the general fact of use and control of the money by the agent. It is not improbable that the agent deceived his principal and abused his powers. But did he *transcend* the powers apparently conferred upon him? We think not. The bank did not select the agent. The principal selected him, and held him forth as her representative. If the agent's infidelity is to injure either, the bank, we think, should not be the victim.

The points ruled by the court are numerous, all of which appear in the syllabus.

Judgment reversed.

Williams, Birnie & Company *vs.* Brown *et al.*

WILLIAMS, BIRNIE & COMPANY, plaintiffs in error, *vs.* J. W. BROWN, sheriff, *et al.*, defendants in error.

(BLECKLEY, Judge, having been of counsel, did not preside in this case.)

1. If a plaintiff in execution, for a valuable consideration, releases property which is subject thereto, it is a satisfaction of such execution to the extent of the value of the property so released, so far as purchasers and creditors are concerned.
2. Will a court of equity compel an older judgment creditor, when there are junior mortgages upon distinct parcels of the debtor's property, to resort, in the first instance, to the property last encumbered, or compel all the property encumbered to contribute *pro rata* to the payment of such lien? *Quare.*
3. Where, on a money rule, the oldest execution was attacked upon the ground that property sufficient to satisfy it had been released from its lien, the exemplification of a bill in equity filed by the present holders of said *f. fa.* to enjoin the levy of the same, then in the control of the defendant to said bill, upon which a consent order had been taken providing for the transfer of said *f. fa.* to the present owners, and the release of certain property therefrom, was admissible, as it tended to show the circumstances under which the transfer was made, and the inducement which led to the release.
4. Where a verdict may, by a reasonable construction, be understood, and a legal judgment can be entered thereon, it is sufficient.

Liens. Mortgages. Equity. Judgments. Verdict. Before Judge BUCHANAN. Fayette Superior Court. February Term, 1876.

Reported in the decision.

E. F. HOGE; P. L. MYNATT, for plaintiffs in error.

A. D. FREEMAN; R. F. LYON; McCAY & TRIPPE; R. H. CLARK, for defendants.

WARNER, Chief Justice.

This was a rule against the sheriff of Fayette county to distribute money arising from the sale of the property of DeVaughn, under a mortgage *f. fa.*, in favor of Groover, Stubbs & Company, against DeVaughn. The money in the hands

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of the sheriff, arising from the sale of the mortgaged property, was claimed by Williams, Birnie & Company, on a *fi. fa.* issued on a judgment obtained in the district court of the United States, on the 21st of March, 1872, in favor of Neal against DeVaughn, and which had been transferred by assignment to the Citizens' Bank of Georgia, and by the bank to Williams, Birnie & Company. The mortgage of Groover, Stubbs & Company was dated 5th of May, 1873, and was of younger date than the above recited judgment. Groover, Stubbs & Company were made parties to the rule against the sheriff, who alleged in his answer that the plaintiffs were not entitled to the money in his hands on their *fi. fa.*, because the same had been levied on property in the town of Jonesboro, when the *fi. fa.* was the property of the Citizens' Bank, of the value of \$12,000 00, and which was mortgaged to said Williams, Birnie & Company, which mortgage was of junior date to that of Groover, Stubbs & Company ; that the Citizens' Bank had also a mortgage on other property of DeVaughn, and that when the plaintiffs took an assignment of the judgment from the bank, that they agreed to release the property covered by the bank's mortgage from the lien of that judgment ; that since the plaintiffs had obtained the control of said *fi. fa.*, they had sold one-half interest in it to one Turner, on the express condition, and for sufficient consideration, that the property in Jonesboro covered by the plaintiffs' mortgage should be released from the lien of said judgment.

The plaintiffs traversed these allegations in the sheriff's answer, and the issue thus formed was submitted to the jury, who, under the charge of the court, returned the following verdict : "We, the jury, find property enough released by Williams, Birnie & Company to satisfy *fi. fa.* in full." The plaintiffs, Williams, Birnie & Company, made a motion for a new trial on the various grounds therein stated, which was overruled by the court, and the plaintiffs excepted.

On the trial of the issue, Groover Stubbs & Company read in evidence a certified copy of a bill in equity filed by Williams, Birnie & Company in the circuit court of the United

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States against the Citizens' Bank and others, in which they alleged that the Neal *f. fa.* had been levied on their mortgaged property in the town of Jonesboro, at the instance of the Citizens' Bank, as the assignee thereof, and also set forth the various mortgage liens that had been created by DeVaughn on his property in favor of different parties, at different times, and the dates thereof, all of which were younger than the Neal judgment; that the Citizens' Bank had a mortgage lien on DeVaughn's property, though the mortgage of Groover, Stubbs & Company was the oldest mortgage lien on the property of DeVaughn, and that he was entirely insolvent. The complainants prayed for an injunction to restrain the sale of their mortgaged property in Jonesboro, and that the Citizens' Bank might be decreed to resort for the satisfaction of its Neal judgment to the property of DeVaughn encumbered by the mortgages thereon in the inverse order in which the same were created, so as that the last encumbered property should be first sold in satisfaction of said judgment lien; but if the complainants were not entitled to that relief, then they prayed that the Citizens' Bank might be decreed to transfer the Neal judgment to them, on payment of the full amount thereof, and should the court feel constrained to deny both of the foregoing prayers, then the complainants prayed that all the property encumbered by the respective mortgage liens should be decreed to contribute *pro rata* to the payment of the Neal judgment lien. It further appears from the evidence of Mr. Hoge, one of the plaintiffs' counsel, who was introduced by Groover, Stubbs & Company, that pending the argument before Judge Erskine, on the application for the injunction prayed for, the counsel for the Citizens' Bank stated in argument that the most that the court could do would be to compel a transfer of the Neal *f. fa.* by the bank, on tender of the amount due thereon, without prejudice to the payment of the bank's mortgage debt; that the bank would not complain of an order which would give it the money due on the *f. fa.* and at the same time protect the bank's mortgage. The judge then asked if such an order could not be made by con-

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sent, and expressed a wish that the case could take some such direction, the judge retiring to his private room for a short time; the counsel for the bank drew up an order he was willing the court should pass, which was read to the judge when he returned, who inquired if it was drawn up agreeable to both sides? Mr. Mynatt, (one of the counsel in the case,) replied that the complainants did not agree or consent to the order or to anything, but that if the court thought proper to make it its judgment, he would not make any further argument. The witness further stated that the *fi. fa.* "was levied upon our hotel property, and had us in a close place, where we were willing to submit to the best terms that the court would give us."

The order of the judge, after stating the names of the parties, was, in substance, as follows: "Ordered that the injunction be granted as prayed for, on condition that the complainants tender to the defendant, the Citizens' Bank of Georgia, the amount of the judgment within ten days, which tender the defendant shall be at liberty to accept or refuse. If defendant refuses, this injunction shall be absolute until further order, and if it accepts, it shall signify such acceptance by entering the fact on said *fi. fa.*, and assigning said *fi. fa.* and judgment to the complainants, but with no right or power in the latter, to enforce said judgment and *fi. fa.* against the property covered by the mortgage given on the 30th of December, 1873, to the Citizens' Bank of Georgia, by M. B. DeVaughn, until after the debt secured by said mortgage shall have been fully satisfied."

The sheriff stated in his answer to the rule, that at the time this order was granted on the plaintiffs' injunction bill, that Groover, Stubbs & Company were not parties thereto, not present themselves, and were without any notice thereof. There is no evidence in the record before us which controverts this part of the sheriff's answer. The bank was willing to make the transfer of the *fi. fa.* to the complainants, and they accepted the same on the terms and conditions, as stated in the assignment thereof, which was made on the 15th of June,

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1875, as appears from the evidence in the record. DeVaughn testified that the property covered by the mortgage to the Citizens' Bank was, at the date of the mortgage in 1873, worth \$8,000 00 or \$9,000 00; worth now \$7,000 00 or \$8,000 00. The hotel property in Jonesboro was worth, on the 5th of June, 1875, \$15,000 00 or \$16,000 00. Mr. Hoge also testified that as the attorney for the plaintiffs, he made a contract with Turner for one-half interest in the Neal *fi. fa.*, who gave his note therefor, and thus became entitled to one-half interest in it. There was no agreement between Turner and witness about releasing the hotel property in Jonesboro from the lien of the *fi. fa.*, though it was witness' intention not to allow said *fi. fa.* to be levied on that property. Witness does not recollect that he told Turner the *fi. fa.* should not be levied on the hotel property, but it was his intention that it should not be levied. Witness agreed with Turner, on the faith of his purchase, not to claim on the *fi. fa.* the proceeds of the sale of certain property sold by Turner under younger *fi. fas.* held by him. There was some property of DeVaughn, in the town of Jonesboro, levied on and sold under junior *fi. fas.* in favor of Turner, and witness notified the sheriff that plaintiffs claimed the fund arising from the sale on the Neal *fi. fa.*; that fund is still in the sheriff's hands; made no agreement with Turner not to bid for said property, but has not put in the *fi. fa.* to claim the money; did not attend the sale to make the property bring its value, but left that to Turner. The property levied on by Turner's junior *fi. fas.*, was the tan-yard and other realty, perhaps, the livery stable lot, the Key house, and the store-house used as a restaurant and confectionery store.

The court charged the jury as follows:

"Williams, Birnie & Company bring a rule against the sheriff to show cause why he should not pay over money in his hands raised by the sale of the property of DeVaughn, to the *fi. fa.* owned and controlled by them, issued from the United States district court, for the northern district of Georgia, in favor of Thomas B. Neal *vs.* DeVaughn. The sheriff has answered. Groover, Stubbs & Company, other creditors of De-

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Vaughn, also claim the money. They claim it on a mortgage *f. fa.* The Neal *f. fa.* is issued on a common law judgment. Williams, Birnie & Company allege that the Neal judgment is older than Groover, Stubbs & Company's mortgage, and had a lien on the land at the time the mortgage was given. When one man has a judgment against another, that judgment binds all the property of the defendant, real and personal from the date of its rendition till it is satisfied.

"The issue before you arises in this way: Groover, Stubbs & Company come in and say that Williams, Birnie & Company's *f. fa.* has no lien on the fund in the sheriff's hands. They claim that this *f. fa.* is extinct or satisfied for the reason, as they allege, that certain property subject to that *f. fa.* has been released by Williams, Birnie & Company. This allegation is denied, and this is the issue: Whether Williams, Birnie & Company's *f. fa.* may participate in the fund and to what extent; whether to the extent of the whole execution or not. If the plaintiff in execution, for a valuable consideration, releases property which is subject thereto, it is a satisfaction of such execution to the extent of the value of the property so released, so far as purchasers and creditors are concerned. The burden of proof is on Groover, Stubbs & Company to show, in this case, the release of property subject to be levied on and sold for the satisfaction of the Neal *f. fa.* If Groover, Stubbs & Company have shown it, and there has been such a release that the lien has been entirely taken away and discharged so that the property could not at any time be levied on, then you will find the issue in favor of Groover, Stubbs & Company, to the extent of the value of the property so released. Groover, Stubbs & Company claim that the property covered by the mortgage to the Citizens' Bank, has been released, and also certain property in Jonesboro. These are allegations, merely, not evidence, and must be sustained by proof, and the burden is on Groover, Stubbs & Company to show what property was released and the value of that property. You are to ascertain what property was released, if any, and its value; and if the release was made, whether for a

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valuable consideration, for this is required. A consideration is valid, if any benefit accrues to one party to the contract, or injury to the other. If there was such a release, then the execution would be satisfied, its lien extinguished as to creditors, and it could not claim the money in the hands of the sheriff. If there was no release or agreement, or no valuable consideration to Williams, Birnie & Company, then you should find for them.

"Williams, Birnie & Company, holding a general judgment against DeVaughn, had the right to make their money out of any property subject to it; to levy on any such property, whether in the hands of purchasers or covered with mortgages, and to sell the same. If you believe property has been released and to extent of the *fi. fa.*, and for a valuable consideration, the form of your verdict will be: 'We, the jury, find the issue in favor of Groover, Stubbs & Company.' And if you find that no property has been released, then the form of your verdict will be: 'We, the jury, find the issue in favor of Williams, Birnie & Company.'

1, 2. The 3658th and 3659th sections of the Code declare that "If the plaintiff in execution, for a valuable consideration, releases property which is subject thereto, it is a satisfaction of such execution to the extent of the value of the property so released, so far as purchasers and creditors are concerned. If an execution creditor, having an older lien on a fund in the hands of the sheriff or other officer, allows such fund, by his consent, to be applied to a younger *fi. fa.*, it shall be considered an extinguishment, *pro tanto*, of such creditor's lien, so far as third persons may be concerned." Whether a court of equity will compel an older judgment creditor, when there are junior mortgages upon distinct parcels of the debtor's property, who is insolvent, on a proper case being made, to resort, in the first instance, for the satisfaction of his judgment, to the property last encumbered by the debtor in the inverse order of the dates thereof, or that all the property encumbered should contribute *pro rata* to the payment of the oldest judgment lien, it is not necessary to decide, in the view

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which we have taken of this case, and as there are but two judges presiding, we do not decide it. The general rule is, as was held by this court in *Barden vs. Brady et al.*, 37 *Georgia Reports*, 660, that where a defendant has sold all his property, a plaintiff in execution may levy on any of such property subject to the lien of his judgment at his option, without regard to the order in which the defendant sold the different portions. And the same general rule is applicable to the mortgages of the defendant's property subject to the prior lien of the plaintiffs' judgment.

The question which was made on the trial of the issue in the case now before us was, whether the plaintiffs, Williams, Birnie & Company, the assignees of the Neal *fi. fa.*, had released any of the defendant's property for a valuable consideration, or had allowed funds arising from the sale of the defendant's property, with their consent, to be applied to younger *fi. fas.* against him, and to what extent? These questions were fairly submitted to the jury, under the charge of the court, and there is sufficient evidence in the record to support the verdict. It was insisted on the argument for the plaintiffs in error that they were entitled to be subrogated to all the rights of the Citizens' Bank, their assignor of the Neal *fi. fa.* Concede that to be so, and the question arises what were the rights of the Citizens' Bank as the holders of the Neal *fi. fa.*? Assuming that the bank purchased it to protect its mortgaged property, in what manner could it legally have done so? The only legal mode by which it could have protected its mortgaged property, would have been to have levied the *fi. fa.* on other property subject thereto, and had it satisfied, and not levied it on its own mortgaged property, and if the plaintiffs, Williams, Birnie & Company, had taken the assignment from the Citizens' Bank, of the *fi. fa.*, just as the bank held it under the assignment from Neal to it, then they would have acquired all the legal rights to collect it out of any property of the defendant which the bank had, under its assignment from Neal. But the present plaintiffs did not hold the *fi. fa.* as the bank held it; they voluntarily became

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the assignees of the *fi. fa.* with a condition annexed thereto, that they would not enforce it against the defendant's property on which the bank held a mortgage, thereby, practically releasing that portion of the defendant's property from the lien of that judgment; in other words, the plaintiffs, by the terms on which they voluntarily agreed to accept the assignment of the *fi. fa.* from the bank, put it out of their power to assign it to Groover, Stubbs & Company with the same legal right to collect it out of any and all the property of the defendant, subject to its lien which the bank had, on payment of the amount due thereon by them. The Citizens' Bank had no legal right, under the provisions of the Code before cited, to release any portion of the defendant's property from the lien of the Neal judgment which it held, not even its own mortgaged property, so far as Groover, Stubbs & Company and the other mortgage creditors of the defendant, DeVaughn, were concerned; and the bank not having any such right, it conveyed none by its assignment of the *fi. fa.* to Williams, Birnie & Company, inasmuch as it could not convey to its assignees any other or greater legal right to use and collect the *fi. fa.* than it had at the time of the assignment thereof. The benefit which resulted to the plaintiffs by the assignment of the Neal *fi. fa.* by the bank to them, was to enable them to protect their own mortgaged property from sale under it, which appears to have been done, and it was a question for them to decide whether they would accept the assignment of the *fi. fa.* on the terms offered by the bank for that purpose or not. There is nothing in the order of Judge Erskine which would have required the plaintiffs, Williams, Birnie & Company, to have accepted the transfer of the *fi. fa.* from the Citizens' Bank, on the terms and conditions stated in the assignment, and if they voluntary agreed to accept the assignment of the *fi. fa.* in consideration that the bank would transfer it to them upon the terms therein stated, and thus relieve their own mortgaged property from sale, then they are bound by it, as well as by the legal effect thereof, so far as the rights

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of Groover, Stubbs & Company and other mortgage creditors of the defendant, DeVaughn, are concerned.

3. There was no error in the refusal of the court to rule out, as evidence, the exemplification of the record of the United States circuit court, hereinbefore referred to, in the case of Williams, Birnie & Company against DeVaughn and the Citizens' Bank of Georgia. That exemplification tended to show a proposition for the transfer of the Neal *fi. fa.* to the plaintiffs by the bank, as well as the inducement and consideration for which the release of the defendant's property, mortgaged to the bank, was agreed to be made as stated in the assignment of the *fi. fa.*

4. The main issue submitted to the jury by the pleadings was, whether the plaintiffs had released, for a valuable consideration, property of the defendant from the lien of their judgment, or allowed funds arising from the sale of the defendant's property to be applied to junior *fi. fas.* with their consent, and to what extent. The jury found, under the evidence and charge of the court, "that property enough had been released by Williams, Birnie & Company to satisfy the *fi. fa* in full." Verdicts are to have a reasonable intendment, and are to receive a reasonable construction, and are not to be avoided, unless from necessity: Code, section 3561. In view of the main issue tried, as made by the pleadings, the verdict of the jury, by receiving a reasonable intendment and construction, may be easily understood, and the appropriate legal judgment be rendered thereon by the court. There was no error in overruling the plaintiffs' motion for a new trial on the statement of facts disclosed in the record.

Let the judgment of the court below be affirmed.

Macon and Augusta Railroad Company *vs.* Vason *et al.*

**THE MACON AND AUGUSTA RAILROAD COMPANY, plaintiff
in error, *vs.* WILLIAM J. VASON *et al.*, executors, defendants
in error.**

1. The books of the company, including the stock-ledger, are admissible in a suit between the company and a stockholder.
2. Settlements between the company and stockholders to whom the company is indebted, may be made by the directors, nothing wrong or fraudulent appearing, they being but a mere adjustment of cross-demands.
3. Allowing stockholders, during the war, to pay up their entire stock subscribed in the then depreciated Confederate currency, before regular calls were made, is illegal on the part of the directors, but the act of the directors, being *ultra vires*, will not discharge other stockholders from paying for their stock on proper calls made, because such act is a mere nullity and will not prevent the company from still collecting from those who paid in such currency the real amount due by them.
4. On a proper case made, with proper parties, by bill in equity, we will not say that a stockholder sued for his subscription may not compel an equitable adjustment between himself and the other stockholders, by which all the stockholders shall be made to pay equally for their respective shares of stock; but the fact that others were allowed to pay in the depreciated currency their entire stock, will not absolutely discharge him, especially when the same privilege was accorded to him, and he was urged to avail himself of it.
5. The number and qualification of directors fixed by the charter are essential to be adhered to, in order to make calls valid; but if payments were made by any stockholder on calls issued by such or similar directors, such payments will be construed to show acquiescence in their conduct and authority, past and future, and the stockholder so acquiescing cannot afterwards object.
6. When the charter expressly requires notice to be given in certain newspapers, and for a certain number of days, before the calls for installments shall be valid, the company must show a compliance with such condition precedent before a recovery can be had on such calls.
7. A forfeiture of stock is a satisfaction of the debt, and when the right to forfeit has been exercised, no action to recover the subscription for the stock so forfeited can be maintained; but a mere threat, made in the call, to forfeit if not paid—that is, that the stock will be forfeited at a future day if payment be not then made—will not bar the action to recover the subscription, especially if it appear that there was no actual forfeiture.

Corporations. Stock. Evidence. *Ultra vires.* Before
Judge GIBSON. Richmond Superior Court. April Term,
1875.

Macon and Augusta Railroad Company *vs.* Vason *et al.*

Reported in the opinion.

HOOK & WEBB, for plaintiff in error.

BARNES & CUMMING ; McCAY & TRIPPE, for defendants.

JACKSON, Judge.

This was a suit brought by the railroad company, against the executors of Turner Clanton, for \$6,500 00 of a subscription of \$10,000 00 to stock, remaining unpaid by Clanton in his lifetime. The jury found a verdict for the sum sued for, with interest from the date of the last call. The executors moved for a new trial on various grounds set forth in the motion, and the presiding judge granted it on one of the grounds alone, and the company excepted. The question for us is, ought the new trial to have been granted on any ground or for any reason? The judgment of the court below is the grant of the new trial, and if the judge granted it rightfully for any reason which appears of record, it is a rightful judgment and should be affirmed, though he may have put it upon a wrong ground or may have given a wrong reason for it. And so this court has uniformly held: 46 *Georgia Reports*, 303, and other cases. There are many grounds set out in the motion, but when analyzed, we think they may be reduced to five.

1. First, it was objected that a book called the stock-ledger, was admitted in evidence. As it had been shown by a receipt signed by Clanton himself, that he was a stockholder, we think that this book should have been admitted. The books of a railroad company are admissible against the corporators, the fact that they are corporators having been otherwise established: Angell & Ames on Cor., 679, 681; 11 *Georgia Reports*, 459; 19 *Ibid.*, 337; 20 *Ibid.*, 279.

2, 3, 4. The second ground is that the company, through its directors, had settled with other corporators at a less sum than the amount they had subscribed, and had permitted

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others to pay the whole of their stock, without call, in depreciated Confederate currency during the war; and this is the ground upon which the court below granted the new trial. It seems, from the evidence, that the settlements other than those in Confederate money, were where there were cross-demands, and there is nothing going to show that such settlements were fraudulent or erroneous. Some latitude must be allowed directors in thus acting, especially when it is not made to appear that any stockholder was thereby hurt. The company would have had to pay the stockholder his demand, and to have sued him for its demand, and why not save expenses of law suits and settle fairly? But it does also appear, that subscribers to stock were permitted to settle in Confederate currency, when it was much depreciated, the *whole amount* they had subscribed, not installments merely called for during the war, but the entire stock they had subscribed. It was replied that the same privilege was extended to Clanton and he could have done the same, but that he declined. We think that he was not bound to pay except upon regular call, and that though he had this offer, he was not precluded from objecting to its illegality. Was it illegal?

We see no authority in the charter whereby the directors were empowered so to act. It seems to have been done *ultra vires*, beyond the authority conferred, and the only trouble in the defense here seems to be, that no stockholder was released from the payment of legally called for installments by this illegal action of the board of directors, and that such installments can be still collected from them in good money, or at least, that they can be made to contribute upon a proper case made, equally with this defendant; that is, they can be made in equity to make their bad money good, by paying the difference. The testimony, however, goes further, and shows that all the Confederate money thus taken was paid out dollar for dollar. If this payment, dollar for dollar, was upon contracts made at gold rates, then no harm was done, and there would be no loss; but if for work at prices corresponding with the depreciated currency, it is clear that all other stock-

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holders were hurt, and upon this point the record is silent. But the plea here is, the naked one that the defendant was released by the fact that such money was so taken by the directors, and upon this naked plea, the act of the directors being *ultra vires*, is a mere nullity; nobody was thereby relieved from future payment at the instance of anybody hurt, and the defendant is not thereby released from the payment of his stock. Upon his going into equity, and making the stockholders parties, and showing damage to himself, and praying that all be made to pay as much real money for their stock as he will have to pay for his, we will not say that he may not have relief, if this depreciated currency did not go as far as good money would have done to pay contracts and debts of the company: Angell & Ames, 297, *et seq.*

5. Another ground for the new trial is, that the calls were not legally made. First, that more persons were directors than the charter authorized, and some of them were not stock-holders, which the charter required; and, secondly, that notice of the calls was not given according to the charter. The proof is quite clear that a larger number of directors acted than the charter authorized, and that some were not stock-holders, but represented Baldwin county, the city of Macon, and other corporations who owned stock, but had paid it in bonds. The charter is part of the contract of the stockholders; but independently of this general principle, in this case, the receipt of Clanton, offered in evidence by the company, shows that he contracted to pay installments or calls "according to the provisions of the charter and by-laws of said company." We should think that this defect would be fatal to the right of recovery by the company, if the defendant had not acquiesced therein; but it appears that in 1860 by-laws were enacted by which six were made a quorum of directors, and thus the charter was violated at the very beginning, and as Clanton, by paying in 1861 and 1863, seems to have acquiesced in this violation as to the number of directors, and perhaps, also as to the representation on the board, of the cor-

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porations of Macon and Baldwin county, and others. If he did so, he ratified what was done, and cannot now complain.

6. In respect to the notices, it seems from the evidence that none of them were advertised in any newspaper in Milledgeville; at least there is no proof that they were so advertised, in this record. The charter requires that this shall be done before the call shall be valid. Its language is, "first giving notice to the stockholders respectively, sixty-days previous to the time required for the payment of such installment, in all the public gazettes of Milledgeville." This appears to be a condition precedent to the validity of the calls, and we think that it should have been proven. It was said that proof of the advertisement in Augusta was sufficient, and a Louisiana case was cited to show that an advertisement in the place where the subscriber lived would be sufficient; but it does not appear that Clanton lived in Augusta; there is no proof in the record that he did live there, and while it may be the fact, the record does not show it. Besides, a mere note of that case was cited in a digest, and what the words of the charter were we do not know. The notice, too, required here was sixty days, and in one of the calls it was only fifty-nine days before payment: Angell & Ames, 517, and note.

7. The last ground on which the motion for the new trial rested, is that the company elected to forfeit defendant's stock, and having done so, that the company could not recover the payments due thereon. Many authorities were cited in the argument, the sum and substance of which seem to establish the principle that the company cannot both forfeit the stock and sue for the balance due. In this case, the stock has not been forfeited, or, at least, there is no sufficient evidence in this record to show it. It is true that the calls which were not paid proclaim that the stock *will be* forfeited if not paid. The nearest approach to this case is one in 35 Vermont, 536. I think it is where the call is that the stock, in default of payment *will be, and is hereby forfeited*; but the call in the case at bar contains only the announcement that it *will be* forfeited. Whatever presumption there may be, if any, that the threat

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was executed, is rebutted by the fact that the last call invites subscribers in arrears to correspond with the secretary, and urges all to pay up past arrearages. The best evidence of the election to forfeit, is the actual forfeiture; and if the whole case taken together shows that there was no actual forfeiture but merely a threat, we shall rule that the payment for the stock may still be enforced. It would be very wrong to enforce payment for what has been forfeited, taken away; but if the stock is still recognized as the property of the subscriber, he ought to pay for what he got and holds, at the agreed price; and we put this case there, just where we think, authority and principle both rest it: Angell & Ames, 550, and numerous cases there cited.

In view of the whole of the facts and the law arising thereon, we will not control the discretion of the presiding judge in granting the new trial.

Judgment affirmed.

R. W. RODGERS *et al.*, plaintiffs in error, *vs.* E. B. ROSSER,
defendant in error.

1. If, after the maturity of a note, a new party sign it as surety for the original maker, and a new stipulation be introduced increasing the rate of interest, no time of payment being expressed, the *prima facie* import of the instrument then is, that it is payable immediately, and that the surety, as well as the principal, is bound for the whole debt.
2. Where no consideration is expressed for the new elements, either party may go into parol evidence to show that there was, or was not, a consideration for them; and, if any, what it was.
3. If it was part of this consideration that the creditor should give indulgence until a certain law-suit was determined, he cannot maintain an action brought while that suit is still pending.
4. But the note being absolute and unconditional, the defendants cannot prove by parol evidence that it was to be surrendered up if that suit did not result in a particular way, without pleading and proving that this stipulation was agreed to be inserted in the note, and was left out by fraud, accident or mistake.
5. The note, when altered by the new contract, being in the hands of a *bona fide* holder for value, who acquired it before maturity and without notice of

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any defect in the original consideration, evidence tending to show a failure of the original consideration was properly excluded.

6. The interest found by the jury being slightly too much, a new trial is granted.

Contracts. Promissory notes. Evidence. New trial. Before Judge HALL. Rockdale Superior Court. April Term, 1876.

E. B. Rosser brought complaint against R. W. Rodgers, as principal, and W. J. Tucker, as security, on three promissory notes, each in the following form :

"By the 25th day of December, 1874, I promise to pay to J. P. Rosser, or bearer, the sum of \$100 00, for value received, with interest at seven per cent. from date. August 18th, 1873.

"We agree to pay five per cent. additional from 1st January last. March 11th, 1875.

"R. W. RODGERS,
"W. J. TUCKER, Security."

Defendant, besides the general issue, filed the following pleas :

1st. Failure of consideration, in this : That the notes were given in partial payment for a lot of land purchased by Rodgers from J. P. Rosser, but that the title was defective, and one Cheney has since brought an action of ejectment to recover possession thereof, claiming it as property set apart to him as a homestead, and that plaintiff had notice of this when he purchased the notes.

2d. That the clause increasing interest, and the signature of Tucker, as security, were added to the notes after suit was brought upon them ; that the consideration therefor was plaintiff's agreement to withdraw said note from suit, and not proceed thereon until the termination of the ejectment case of Cheney *vs.* Rodgers—and if Cheney recovered the land plaintiff to surrender the notes ; that said ejectment case is still pending.

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The evidence for plaintiff made, in brief, the following case: The notes came into plaintiff's hands, before maturity, in the regular course of trade, and were paid for by him. They did not then contain the last clause, as to increased interest, or the name of Tucker, as security. Plaintiff instituted suit on them. Rodgers and Tucker agreed to add five per cent. to the rate of interest, and that the latter would sign the notes as security provided plaintiff should withdraw them from suit and "wait until times got better." Money was very scarce at that time, not so scarce when suit was re-brought. Plaintiff knew nothing of any claim of homestead or contest about title to the land when he bought the notes.

The evidence for defendants made, in brief, the following case: The notes were given to J. P. Rosser in partial payment for a certain tract of land; Rodgers took bond for title and went into possession. Since then, one Cheney has brought an action of ejectment against him to recover this property, on the ground that he had purchased it with the proceeds of the sale of his homestead. Plaintiff brought suit on the notes. He agreed, however, to withdraw them from suit and wait, if the clause as to interest should be added and Tucker sign as security. This was accordingly done, and the note withdrawn from suit. The ejectment cause is still pending.

The jury found for the plaintiff \$300 00, with interest from January 1st, 1874, at twelve per cent.

Defendant moved for a new trial, on the following among other grounds:

1st. Because the court charged as follows: "If Rodgers was sued, and Tucker signed the note, as security, in consideration of Rosser's withdrawing the suit and giving indulgence, and Rosser did withdraw the suit and give the indulgence, then that was sufficient consideration to bind him (Tucker) and if bound, he would be bound for the full amount of the notes, just as though he had originally signed as security."

2d. Because the court rejected parol evidence tending to show that, when the new elements were added to the notes,

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plaintiff agreed to delay suit until the termination of the case of Cheney *vs.* Rodgers; and if this was decided against Rodgers, the notes were to be void, if for him, he should have time to pay the debt.

(The note of the presiding judge denies the rejection of evidence to show that time formed the consideration of the contract made when Tucker signed as security; but admits the exclusion of evidence tending to show that the notes were to be void under certain conditions.)

3d. Because the court rejected the proceedings by Cheney to obtain a homestead, to sell the same and reinvest the proceeds, and to eject Rodgers, all of which were offered to show failure in the consideration of the notes.

4th. Because the verdict was contrary to the evidence.

The motion was overruled, and defendants excepted.

A. C. PERRY; A. C. McCALLA; T. J. CHRISTIAN, for plaintiffs in error.

J. C. BARTON; GEORGE W. GLEATON, for defendant.

BLECKLEY, Judge.

Several of the grounds taken in the motion for new trial are not verified by the judge. Of course these are left unconsidered. The others are not dealt with in any regular order, but they are all disposed of, substantially, in the rulings we have made.

Judgment reversed.

NATHANIEL F. WALKER *et al.*, plaintiffs in error, vs. JAMES H. BIVINS *et al.*, defendants in error.

(BLECKLEY, Judge, having been of counsel, did not preside in this case.)

1. The fact that two days had been consumed in the trial of a motion to vacate a judgment made by one of two defendants thereto, and that the mo-

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tion was voluntarily dismissed by said defendant after such consumption of time, is not legal cause for the dismissal by the court of another motion to vacate, made by both defendants, especially if additional grounds for the new motion be set out therein.

2. On an appeal from a judgment at common law, rendered in 1860, the court has no power to enter up judgment against the defendant and his security on the appeal, in 1874, without the intervention of a jury, though no defense be filed on oath, and such judgment is null and void.

Practice in the Superior Court. Appeal. Constitutional law. Judgments. Before Judge WRIGHT. Upson Superior Court. November Adjourned Term, 1875.

Reported in the opinion.

W. S. WALLACE; S. HALL; RUTHERFORD & RUTHERFORD, for plaintiffs in error.

HAWKINS & HAWKINS; SPEER & STEWART: PEEPLES & HOWELL, for defendants.

JACKSON, Judge.

A judgment was obtained by Bivins against N. F. Walker in 1860. J. P. Walker was security on the appeal, at least he was alleged to have been such surety, and in 1874, the judge of the superior court, without the intervention of a jury, rendered judgment against both, the defendant in the first judgment and the surety on the appeal bond. One of the Walkers moved to vacate the judgment on various grounds, and it was agreed that the judge should hear and determine the case. After two days consumed in the trial thereof, the motion was dismissed by the movant. Afterwards, at the same term, another motion was made by both of the Walkers to vacate, with some additional grounds, but mainly on the same grounds. Among the grounds, in both motions, was the denial of the right of the judge to enter up judgment against the principal and his surety on appeal, on an appeal from the petit to a special jury, entered before the constitution of 1868, without the finding of the condemnation money by a

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jury. The court below dismissed the latter motion to vacate, and this judgment of the court below raises two questions for our adjudication: first, was the court right in dismissing the motion of the *two* defendants because *one* had voluntarily withdrawn a similar motion after much consumption of time; and, secondly, was the court right to dismiss the motion in view of the fact that the judgment in an appeal case, entered before 1868, was rendered without a jury?

1. On the first point, we think that the court clearly erred. Another party was interested in the second motion. It was a new case, and however badly one of the defendants to the judgment may have acted, it should not have prejudiced the other. Besides, there were new grounds in the second motion, which made it, for this reason, also a new case. Even if it had been renewed by the first movant alone, why could he not have dismissed and renewed a motion to vacate? We are not aware of any law to prevent his doing so. The court could punish for contempt, if he had been guilty of any contempt; but the court could not thus have deprived him of a right to be heard on his case a second time.

2. But the great and controlling question in this litigation is the second one made here: can the court, without the verdict of a jury, enter a judgment on an appeal taken before the constitution of 1868, not only against the defendant to the first judgment, but against his security on the appeal? That constitution declares that "there shall be no appeal from one jury in the superior court to another; but the court may grant new trials on legal grounds. The court shall render judgment, without the verdict of a jury, in all civil cases founded on contract, where an issuable defense is not filed on oath." No issuable defense was filed on oath in this case; it is, therefore, argued that the court must render judgment without a jury. But we think that this clause of the constitution, Code, section 5091, is prospective in its operation. "There shall be no appeal," is its language. It is in the future tense, and its grammatical construction and meaning would not be made plainer had it been added there shall *hereafter* be no appeal,

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etc. In the next paragraph it is added, in the same clause, "but the court may grant new trials on legal grounds," evidently meaning to substitute this new trial authority for the appeal of former times. But this latter provision is clearly prospective. It could not mean that the court should go over the case on which a judgment had been rendered years ago, and grant a new trial thereon. Both clauses related to the future. So with the last paragraph, the right and duty of the court to enter judgment without a jury. We think it prospective only; certainly prospective where any right had been acquired under the old law, and particularly in cases where a surety on an appeal bond was concerned. But it may be said how shall the appeal case be tried? We answer, just as it was before the constitution of 1868 was passed. That constitution declares that "the right of trial by jury, except where it is otherwise provided in this constitution, shall remain inviolate;" Code, section 5124. It is not elsewhere in the constitution provided how a pending appeal shall be tried, and therefore the old right remains "*inviolate*," to-wit: the right of trial by a special jury. Direction is given to the superior courts, by statute, to try by special jury taken from the grand jury: Code, sections 3925 3926, 3927, and the oath is prescribed. It is true that there is now no separate box from which grand jurors are drawn; but still those drawn to serve as such are grand jurors, and special juries are selected from them as in the olden time. The only alteration is that petit jurors are elevated, not that grand jurors are depressed, by the new constitution of 1868. Upright and intelligent persons alone can serve as jurors: Code, sec. 5125. The oath of special jurors alone is altered, and that does not affect the great right of jury trial. Indeed, if the trial should be had in such an appeal case before the traverse jury, it would be the spirit of the old special jury trial; for upright and intelligent men would try, and the right to select by striking would remain. The great point to be preserved is the right to have a jury pass upon the damages as well as upon the case. When this party appealed, and this other party signed his appeal bond,

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they both contracted to have a special jury pass upon their rights. They never bargained for a judge alone, without a jury, to do so. The right became to all intents and purposes vested; the right to have the eventual condemnation money fixed by their peers. How would it look for the judge who entered this judgment, without a trial by jury, to have assessed damages for a frivolous appeal? Who will say that this power was conferred upon him by the constitution of 1868? On the contrary, that constitution provides for trial by jury still, in cases which arose after its enactment, on appeals from inferior courts. It abolishes trial by jury in the justices' courts, but provides for jury trial in the superior courts on appeal from the justices' courts: Code, sections 5104, 5105. Such a thing as an appeal trial without a jury, on facts, is still unknown to our jurisprudence, unless by consent to submit facts as well as law to the court. We hold, therefore, that the judge who granted this judgment in 1874 had no legal or constitutional authority to do so, and that it is wholly null and void; and we therefore reverse the court below in dismissing the motion to vacate this illegal judgment.

Judgment reversed.

**FRANCIS A. FROST, plaintiff in error, vs. WILSON ALLEN
et al., defendants in error.**

An instrument, after reciting that the makers were indebted to F. in an amount named, for which a note had been given, conveyed to him certain personality, specifying that it was intended that the title should pass. It provided further, that if the note was not paid when due, F. should take possession of said property, and after advertising, sell it, and apply the proceeds to the debt; that if the note was met at maturity, he should reconvey by quit-claim deed:

Held, that the instrument was a mortgage, and might be foreclosed as such.

Contracts. Mortgages. Before Judge BUCHANAN. Troup Superior Court. May Term, 1876.

Reported in the decision.

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FERRELL & LONGLEY, for plaintiff in error.

BIGHAM & WHITAKER, for defendants.

WARNER, Chief Justice.

This was a claim case. It appears from the record that Wilson Allen and Amanda Allen, on the 19th day of February, 1875, executed and delivered to Frost the annexed instrument in writing, which was duly recorded within three months from the date thereof. Frost proceeded to foreclose the paper writing as a mortgage, a *fi. fa.* was issued on the judgment of foreclosure and levied on the property, which was claimed by Amanda Allen. When the claim case was called for trial, the claimant made a motion to dismiss the plaintiff's levy on the mortgage *fi. fa.*, on the ground that the paper writing on which the plaintiff's proceedings were based was not a mortgage. The court sustained the motion and dismissed the levy, whereupon the plaintiff excepted.

The following is the paper writing which the plaintiff foreclosed as a mortgage, to-wit:

"GEORGIA—TROUP COUNTY.

"Be it known, that we, Wilson Allen and Amanda Allen, both of said county, are justly indebted to F. A. Frost in the sum of \$684 40, which is evidenced by promissory note bearing even date with these presents. Now, for and in consideration of said sum of \$684 40 furnished us the present year by said F. A. Frost in the way of provisions, we hereby sell, transfer and assign to said Frost the following described property, to-wit: One black horse, name Coley; one gray mare, name Kit; one sorrel horse, named Ball; one bay mare, known as the Sea Mare; one two year old mule; one two year old filly; one two year old horse colt; two one year old horse colts; four cows, three heifers, and one yoke oxen; six head of stock cattle and twenty head of sheep; one Studebaker wagon; one grain reaper and fixtures; one gin and condenser. And it is our intention, by this contract, to vest

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the title to said property in said Frost in consideration of said indebtedness on our part to said Frost, and we hereby renounce and waive all right to a homestead and exemption in and to said property; and it is further agreed, that if said note is not paid by the first day of November, 1875, then the said Frost is hereby invested with power to take immediate possession of said property, and after advertising the same for ten days in the LaGrange Reporter newspaper, to sell at public outcry, before the court-house door, in the city of LaGrange, said property herein conveyed, for cash, to the highest and best bidder, and after paying off and discharging said note, principal, interest and costs, the balance, if any, should go as a credit upon another note held by said Frost on said Wilson Allen, and secured by mortgage deed on land; but if the said Wilson Allen and Amanda Allen shall well and truly pay off said note by said first day of November, 1875, then the said Frost hereby agrees to give to said Wilson Allen and Amanda Allen a quit-claim title to said property."

Was the foregoing recited instrument a mortgage, and was the plaintiff at liberty to treat it as such and foreclose it as a mortgage under the provisions of our statute? A mortgage in this state is only a security for a debt, and passes no title. It may embrace all property in possession, or to which the mortgagor has the right of possession at the time. No particular form is necessary to constitute a mortgage. It must clearly indicate the creation of a lien, specify the debt to secure which it is given, and the property upon which it is to take effect: *Code, sections 1954, 1955.* The instrument in question is of an anomalous character, and it is somewhat difficult to classify it according to any well settled legal definition. In our judgment, it has more of the elements of a mortgage than of an absolute conveyance of the property therein named. It was evidently intended to be a security for the payment of the debt due to Frost, and if that debt was paid by the 1st day of November, 1875, Frost was to reconvey the property by a quit-claim title. The title to the property cannot fairly be said to have been vested in Frost.

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for any other purpose than to authorize him to sell it for the payment of the debt, in the event of its non-payment by the 1st of November, 1875; and the Allens would have been entitled, in a court of equity, to a decree that Frost should reconvey the property by a quit-claim title, on the payment by them of the principal and interest due on the debt, at any time before the property was sold. The court, therefore, erred in dismissing the plaintiff's levy on the ground that the paper writing foreclosed was not a mortgage.

Let the judgment of the court below be reversed.

WILLIAM MEEKS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. That one of the traverse jurors had not been a resident of the county for as much as six months before the trial, which fact was unknown to the prisoner and his counsel until after verdict, is not cause for new trial.
2. Where there is direct evidence of a homicide by shooting, and direct evidence that the prisoner was present and admitted that he shot the deceased, the case is not one founded solely on circumstantial testimony.
3. In charging on the grades of homicide, it is not error to omit the provisions of the Code prescribing the punishment for the various grades of manslaughter.
4. Though, in a motion for new trial, it be alleged that a principle of law apparently applicable to the case was not charged, the supreme court will not grant a new trial, where there is no verification by the presiding judge, either that the charge was requested or that it was not given.
5. Inasmuch as a new trial for newly discovered evidence should not be granted unless the new evidence would probably produce a different verdict, the judge, in the exercise of his discretion, may hear affidavits for and against the truth of the alleged new facts, and for and against the credibility of the witnesses by whom it is proposed to establish them, and thus go to the bottom of the showing, so as to discover, if possible, how much of true substance there is in the alleged new matter.
6. There was no abuse of discretion in denying a new trial on the ground of newly discovered evidence, the new evidence being chiefly cumulative.

Criminal law. Jury. Charge of court. Practice in the Supreme Court. New trial. Newly discovered evidence. Before Judge UNDERWOOD. Polk Superior Court. February Term, 1876.

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Meeks was placed on trial for the murder of John McCormick, alleged to have been committed on the 6th of June, 1875. He pleaded not guilty. The evidence made a clear case of murder, and the jury so found. The defendant moved for a new trial upon the following, among other grounds:

1st. Because the court erred in not giving the law of circumstantial evidence in charge, and in not explaining to the jury their right to find a verdict of guilty, with a recommendation to mercy, and the effect of such recommendation.

In reference to this ground, it is only necessary to state that there was direct evidence to show that the defendant was present, with a pistol in his hand, at the time deceased was killed, and that he admitted that he shot him.

2d. Because the court erred in failing to explain to the jury the penalty of each of the grades of manslaughter, merely reading the definitions from the Code, without other or further explanations.

3d. Because Milton E. McCamack, one of the jurors who tried defendant, and who was summoned as a tales juror, was a citizen of the state of Alabama and not a citizen of the county of Polk and state of Georgia; for that the said McCamack moved, within the six weeks preceding the trial, from Alabama to Polk county.

In support of this ground, the affidavit of counsel was attached, to the effect that they were ignorant of the fact until after the verdict was rendered. Also, the affidavit of the juror that he moved from Georgia to Alabama in December, 1874, and returned to the county of Polk on or about the 22d of December, 1875, to become a citizen of Georgia.

There were incorporated in the motion several grounds based on the failure of the court to charge certain principles of law, and on the discovery of newly discovered evidence. The record and bill of exceptions fail to disclose that any requests to charge were made, or that, if requested, such requests were not charged.

The newly discovered evidence was principally cumulative,

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and was not of such a character as to have changed the result in case of a second trial. The court allowed a counter showing, by which the credibility of the newly discovered witnesses was very seriously attacked, and to this the defendant excepted.

Two of such witnesses were shown to have been confined in jail with defendant, one for hog stealing and the other for larceny from the house, the former having already served one term in the penitentiary. One of them proposed to testify to threats on the part of deceased to kill defendant. The other, together with another witness, proposed to show that defendant was in such a position at the time of the homicide as it would have been impossible for him to have done the killing. The counter-affidavits demonstrated that these witnesses were not in the vicinity of the place of the homicide at the time the shooting was done.

The motion was overruled and the defendant excepted.

JOHN W. WOFFORD; WRIGHT & FEATHERSTON; J. A. BLANCE; M. F. THOMPSON; W. M. SPARKS; JOHN M. KING; C. G. JONES, for plaintiff in error.

C. T. CLEMENTS, solicitor general; DABNEY & FOUCHE, for the state.

BLECKLEY, Judge.

We have subjected this record to a careful and thorough scrutiny, and have been unable to discover in it any good reason for granting the prisoner a new trial. He appears to have been legally convicted, after a full and fair trial, upon evidence not only warranting, but absolutely requiring the verdict. For a sufficiently elaborate presentation of the legal points ruled by the court, I refer to the head-notes.

Judgment affirmed.

Robinson *vs.* Smith.

JOHN W. ROBINSON, solicitor general, plaintiff in error, *vs.*
CALEB W. SMITH, ordinary, defendant in error.

Where a prisoner escapes before trial, the solicitor general is only entitled to the costs which have accrued up to the time of such escape.

Criminal law. Escape. Costs. Before Judge JOHNSON.
Tattnall Superior Court. April Term, 1875.

Reported in the decision.

JOHN W. ROBINSON, by Z. D. HARRISON, for plaintiff in error.

JOHN MILLEDGE, for defendant.

WARNER, Chief Justice.

The only question made by the record and bill of exceptions in this case is, whether the plaintiff in error, as solicitor general, was entitled to full costs, as prescribed in the 1646th section of the Code, when the defendant escapes before trial and conviction, as when the defendant has been tried and convicted. The court decided that he was not, and the solicitor general excepted.

The solicitor general claims that he is entitled to full costs when the defendant escapes as he would be after trial and conviction, under the provisions of the 4699th section of the Code. Construing the 1646th and the 4699th sections together, we think that the solicitor general is only entitled to such costs as have accrued up to the time of the defendant's escape—that is to say, \$5 00 for drawing the indictment, etc., and no more than is allowed him by the fee bill, up to the time of trial, in cases where there has been no escape. The solicitor general is not entitled to charge the full costs allowed him by the fee bill, when the defendant escapes, as he would be entitled to when the defendant is tried and convicted. Whether the court allowed the solicitor general the costs to which he was lawfully entitled, up to the time of the escape of the

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defendants, we are not able to ascertain from the record and bill of exceptions, but assuming that the court performed its legal duty in that respect, we affirm the judgment of the court below.

Judgment affirmed.

JONATHAN COLLINS & SON *et al.*, plaintiffs in error, vs. DANIEL BULLARD, defendant in error.

1. As to the counsel fees, this case is identical in principle with that of *Rodgers vs. Hamilton*, 49 *Georgia Reports*, 604, which rules that the fees are not recoverable.
2. That suit was brought in a court of record for a given cause of action and afterwards dismissed, cannot be proved by parol, where no excuse is shown for not producing better evidence.
3. The verdict may be amended by separating principal and interest, though the jury have dispersed by consent of counsel and with leave of the court, after agreeing upon the verdict and before delivering it into court, the amendment being made when the verdict is returned and read.

Negotiable instruments. Contracts. Attorney. Evidence. Verdict. Amendment. Practice in the Superior Court. Before Judge HILL. Bibb Superior Court. April Term, 1876.

Bullard brought complaint against Collins & Son as acceptors and indorsers, and Collins, Flanders & Company as indorsers, on the following acceptance :

“ \$1,582 23. MACON, GEORGIA, April 5th, 1872.

“ Seven months after date please pay to the order of ourselves \$1,587 23, for value received in provisions, as an advance on my present growing crop of cotton, all of which hereby promise to deliver to you, at your warehouse, in time to be sold so that the proceeds may be applied, at its maturity, to the payment of this draft. Binding also hereby, my crop of corn, my stock of all kinds, for the full and punctual performance of the above obligation, and the payment of all costs and counsel fees incurred in the premises, and

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giving you hereby full and legal control of the same, with power to transfer this lien.

(Signed) W. B. TARVER & BROTHER.
"To J. Collins & Son, Macon, Ga.

"Accepted 29th April, 1872.

"JONATHAN COLLINS & SON.

"Indorsed:

"W. B. TARVER & BROTHER,

"J. COLLINS & SON,

"COLLINS, FLANDERS & COMPANY."

The defendants pleaded the general issue, payment, and set-off of \$327 09, on account of usury paid to plaintiff by defendants.

The evidence showed that the amount due on the face of the draft had been paid, but the attorneys collecting the same applied a portion of such payment to the satisfaction of fees due for making the collection. No legal proceedings were instituted by them. The defendants denied their liability for counsel fees. This presented the main question in the case.

If liable on the draft for counsel fees, defendants relied upon the usury paid plaintiff to defeat a recovery; but, to avoid the statutory bar, it became necessary to show a suit for such usury, in time, in Twiggs superior court, a dismissal of such suit, and a renewal of the same by this plea of set-off, within six months from such dismissal. The suit in Twiggs, and its dismissal, defendants proposed to establish by parol. This the court refused to permit, and defendants excepted.

When the case was submitted to the jury, by consent of counsel, the court instructed them that if they should agree upon a verdict during recess, to seal up the same, deliver it to their foreman, and return it when court re-assembled. Accordingly, when court convened, after the recess, the jury returned the sealed package, which, upon being opened, presented the following verdict:

"We, the jury, find for the plaintiff \$122 26 for principal and interest to date."

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Whereupon the court, over defendants' objection, allowed the verdict to be amended by the jury so as to read as follows: "We, the jury, find for the plaintiff \$86 59, being for principal, and \$36 45 interest to date."

The defendants moved for a new trial upon the following, among other grounds:

1st. Because the court charged the jury that the acceptors and indorsers were primarily liable on the draft for reasonable counsel fees.

2d. Because the court refused to charge, that the lien for attorneys' fees, was not a good lien under the act of 1866, authorizing liens to secure the payment of money due for provisions, and that such fees were not recoverable in a suit at law for the debt.

3d. Because court erred in rejecting the parol evidence as to the suit for usury in Twiggs, and the dismissal of the same.

4th. Because the court erred in allowing the verdict to be amended in the manner above stated, after it was returned.

The motion was overruled and the defendants excepted.

R. F. LYON ; A. PROUDFIT, for plaintiffs in error.

LANIER & ANDERSON, HILL & HARRIS, for defendant.

BLECKLEY, Judge.

1. In the matter of counsel fees, we find it impossible to distinguish this case, in principle, from that of *Rodgers vs. Hamilton*, 49 *Georgia Reports*, 604. If that case was correctly ruled, the fees are not recoverable.

2. The dismissal of a suit in a court of record is provable by the record. Until it be shown that a transcript cannot be obtained, no inferior evidence is admissible to show the existence of the suit, or what became of it, where these questions are directly in issue, as in the present case.

3. It was not improper to amend the verdict, under the circumstances detailed in the record.

Judgment reversed.

The Central Railroad and Banking Company *vs.* G. T. Rogers' Sons.

THE CENTRAL RAILROAD AND BANKING COMPANY, plaintiff in error, *vs.* GEORGE T. ROGERS' SONS, defendants in error.

(*JACKSON*, Judge, having been of counsel, did not preside in this case.)

1. Certain depositions were excluded because the responses to the cross-interrogatories were not full. The court ordered that they be re-executed, the original answers remaining of file in the clerk's office. Instead of this the entire package was returned for re-execution, and both sets of answers were offered together at a subsequent term to which the case had been continued :

Held, that objection made thereto after the case was submitted to the jury, was properly overruled.

2. Where two arbitrators, to whom a verbal submission had been made as to the injury to certain goods shipped over a line of railroads, but who were not sworn and did not examine any witnesses, reported in writing that, at the request of the parties, they had examined the flour in controversy and found it damaged \$1 25 per barrel, and that it was in such condition previous to shipment :

Held, that it was not error in the court to charge that such a report could do "no more than show the damage to the flour, if that."

3. Where goods, received for as in good order by the first of a connecting line of railroads, are delivered in a damaged condition to the consignee, the last road, being sued therefor, may show that, though apparently in good order, they were damaged before shipment.

Interrogatories. Practice in the Superior Court. Arbitrament and award. Charge of court. Railroads. Before Judge HILL. Bibb Superior Court. October Term, 1875.

Reported in the decision.

R. F. LYON, for plaintiff in error.

LANIER & ANDERSON, HILL & HARRIS, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant to recover for damage done to eighty barrels of flour shipped over its road, in consequence of the damaged condition of the flour at the time of the delivery thereof to the

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plaintiffs at Macon. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the plaintiffs for the sum of \$140 00 besides interest.

It appears from the bill of exceptions that during the progress of the trial, the plaintiff offered in evidence the interrogatories and answers of two witnesses, which had been offered on a former trial of the case and rejected by the court because the witnesses had failed fully to answer the defendant's cross-interrogatories, the court directing that said interrogatories should be sent back to be re-executed, retaining the answers of the witnesses in the clerk's office, which was not done, but the answers were sent back with the interrogatories to be re-executed, and returned in the same envelop.

The court overruled the defendant's objection to the reading of the interrogatories in evidence, on the ground that the objection should have been made before the case was submitted to the jury, to which the defendant excepted.

It appears from the evidence in the record, that the flour was shipped from Louisville to Macon, and received for as in good order, as through freight, accompanied by a through freight list, and when it arrived in Macon it was damaged by having been wet. It also appears from the evidence, that when it was discovered that the flour had been damaged, on its arrival in Macon, a survey was had, as was usual with the railroads and merchants in Macon, to adjust and settle the damages, and Messrs. Rice and Goode, to whom the matter was referred, reported in writing, that at the request of the plaintiffs, and the agent of defendant, they had examined the flour, and found it badly damaged by water, to the extent of \$1 75 per barrel, and that said shipment was in that condition previous to shipment, but they were not sworn, and examined no witnesses. It also appeared from the evidence of some of the witnesses that the flour was apparently in good order upon its arrival in Macon, though one of the plaintiffs testified that he discovered water stains, and signs of the barrels having been wet, which caused him to examine the flour. There is also evidence in the record going to show that the

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flour must have been damaged before shipment, but the evidence was conflicting in relation to this point in the case. The court charged the jury to the effect, that inasmuch as the surveyors, Rice and Goode, were not sworn, and did not examine witnesses, and there being no submission in writing by the parties, their report or award, did not amount to anything more than to show the value of the damage done to the flour, if that; to which charge the defendant excepted.

The court further charged the jury, amongst other things, "that if the shipment of flour was made on the 16th of July, 1873, on a Louisville and Nashville railroad car, through to Macon, and the flour received at the starting point 'as in good order,' then the defendant was liable to plaintiffs for the amount of damage on the flour from having been wet, whether the damage was done on the road of defendant or any one of the several connecting roads over which it passed from the starting point, and the defendant was liable to the plaintiffs, under this state of facts, if true, although the flour was in this damaged condition before it left the mills at which it was manufactured and was carried aboard the cars." To which charge the defendant excepted.

1. There was no error in overruling the defendant's objections to the plaintiffs' interrogatories. The interrogatories had been re-executed under the order of the court and returned, and the same rule in regard to exceptions was as applicable to them as any other interrogatories.

2. In view of the loose and uncertain manner in which the question of damages was submitted, considered and reported by Messrs. Rice and Goode, as set forth in the record, we find no error in the charge of the court in relation to the effect thereof as evidence before the jury.

3. In our judgment, the following part of the charge of the court was error, in view of the conflicting evidence as to whether the flour was damaged before its shipment or afterwards, to-wit: "And the defendant was liable to the plaintiffs, under this state of facts, if true, although the flour was in this damaged condition before it left the mills at which it

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was manufactured and was carried aboard the cars." It is true that the 2084th section of the Code declares that where there are several connecting railroads under different companies, the last company which has received the goods in "good order," shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability.

The precise question is, when the goods have been received by the railroad company from the shipper, in apparently good order, and receipted for as being in good order, can the defendant, when sued for the alleged damage done to the goods, rebut the presumption of its *prima facie* liability therefor, by evidence going to show that the damage was not done to the goods on either of the lines of railroad over which the goods were carried, but that the damage was done to the goods before the same were received by either of the connecting railroads? The section of the Code before cited evidently contemplates damage done to the goods *by the railroad companies*, and not damage done to the goods before the same were received by the railroad companies, or either of them. For example, if the agent of a railroad company, at the place of shipment, should receive a cask of crockery-ware *apparently* in good order, and should receipt for the same as in good order, and when received by the consignee one-half of it was broken, ought the railroad company, when sued for the alleged damage done on its road or its connecting roads, be prevented from showing, if it can do so, that the damage was not done to the crockery on either of the railroads over which it had been shipped, but that the damage was done to the crockery before shipment? The same principle would be applicable to the shipment of barrels of flour as to a cask of crockery-ware, when the same, from the external appearance thereof, were apparently in good order. When the goods have been receipted for to the shipper as being in good order, that is *prima facie* evidence of that fact as against the company and its connecting roads in case the goods are damaged, but that will not prevent the defendant from showing, if it can do so,

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that the damage complained of was not done on either of the connecting roads over which the goods were shipped, but that the damage complained of was done to the goods before the shipment thereof. In order to do this, however, the burden of proof is on the defendant. The charge of the court excluded from the consideration of the jury that portion of the defendant's evidence which went to show that the flour was damaged before the shipment thereof.

Let the judgment of the court below be reversed.

THE CITY OF ATLANTA, plaintiff in error, vs. GRANT, ALXANDER & COMPANY *et al.*, defendants in error.

(JACKSON, Judge, on account of relationship to some of the parties defendant, did not preside.)

1. A chartered railroad, with all rights and privileges that properly appertain to it as an instrument of transportation, (excluding of course, the franchise of the corporation to be a body politic) is property, subject to be applied to the payment of its just debts; and the whole may be sold for that purpose, in this state, under a judgment at law.
2. But the judgment, and the execution founded thereon, must be specially moulded, in substantial compliance with sections 3082, 3562, 3639 of the Code; if not in all cases, certainly in a case where the railroad, in pursuance of the charter, has been located and partially constructed in three counties.
3. A sale under an execution not thus moulded, about to be made by the sheriff, may be arrested by an affidavit of illegality interposed by the corporation, through its proper officers.
4. Such a sale, though consummated without legal resistance, would be void; and, consequently, the rights of other creditors, or of the stockholders, would not be lost. And if injunction, at the instance of one or more of these, could be granted at all, to prevent the intended sale, a necessary condition would be, that the executive officer of the corporation had been requested to interpose an affidavit of illegality, and had refused to do so; or that such request had been omitted for some sufficient reason.
5. The judgment from which the execution issued in the present case, is not void as a general judgment, whether the element of contractor's lien be sustainable or not; and it is amendable by superadding appropriate directions for making sale of the property, and for issuing a special execution in conformity.

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6. The declaration is sufficient; and the clerical error in the date of filing, is amendable by the date of the process, fortified, as it is, by the return of service.

Railroads. Corporations. Levy and sale. Executions. Illegality. Injunction. Judgments. Amendment. Lien. Before Judge PEEPLES. Fulton county. At Chambers. August 20th, 1876.

The City of Atlanta filed its bill against Grant, Alexander & Company, making, in brief, the following case:

Complainant is interested in the corporation known as the Western Railroad Company, either as a stockholder or creditor, to the amount of \$300,000 00. In the year 1854, said company was incorporated for the purpose of constructing a railroad from the city of Atlanta, through or near Villa Rica, or Carrollton, in Carroll county, and beyond, westwardly, to the Alabama line, and authority was granted to it to build the road, to equip, use and enjoy it, with all the rights, etc., granted to the Central Railroad and Banking Company. The complainant subscribed to the stock of said Georgia Western Railroad to the amount of \$300,000 00. The road was located through the counties of Fulton, Cobb, and a part of the way through the county of Carroll. The right of way was secured by deeds from the owners of lands over which the road was to run, and covered the fee simple title for railroad purposes.

On the 4th of May, 1872, a contract was entered into between the company and the defendants for the construction of the road from the city of Atlanta to the Alabama line. By an act of the legislature, the company was authorized to construct the road on the right of way of the Western and Atlantic Railroad within, and adjacent to, the city of Atlanta, and to any distance east of the Chattahoochee river. Said right of way is the property of the state, and the right to use the same was alone granted to the Georgia Western. The defendants entered upon the work and prosecuted it until the early part of the year 1874, when it was suspended. The road was constructed into Carroll county, but not to the state line.

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On the 18th of April, 1874, the defendants filed, in the clerk's office of Fulton county, a claim of lien, as contractors, for their work and materials, on the grading, culverts and appurtenances of the road, and the premises or real estate on which it was erected, together with the depot grounds and all other real estate connected with the road or belonging to the company, including the right of way and the franchises thereof. The amount alleged to be due them was \$40,699 87, besides interest. Similar claims of lien were filed in the clerks' offices of Cobb and Douglass counties on the 5th of May following. It does not appear from the papers when the work was completed. It is stated in the claim of lien that it was completed since the 1st of March, 1874, and in the declaration based thereon, it is averred that the indebtedness existed on the 16th of March, 1874. Complainant is informed and believes that there was no work done after the 1st of March, 1874. At the date of the contract, and at the dates of doing the work and furnishing the material, the law required the record of the claim to be made within thirty days after the completion of the work. This was not done. In any event, had the law been complied with, the lien could extend only to the railroad, and could not be rightfully extended to any of the other property described in the claim. As to the railroad itself, the description of it in the claim was too loose and indefinite, it being described only as commencing at the city of Atlanta, in said county of Fulton, and extending partly along the line of the Western and Atlantic Railroad, westwardly, through the counties of Fulton, Cobb and Douglass, toward the state of Alabama. On the 17th of September, 1874, a suit was commenced in Fulton superior court, by the defendants, for the enforcement of their supposed lien. The next term of the court was to convene on October 5th, which was less than twenty days from the filing of the petition. No process appears to have been subsequently issued in the cause. Attached to the petition there is what purports to be process, but it is dated July 17th, 1874. The company never appeared or made defense in the cause. On the 10th of April,

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1875, a judgment was rendered by the court without the intervention of a jury. The amount of the debt was fixed, and it was further determined that the plaintiffs (Grant, Alexander & Company) had a lien, which was thereby foreclosed, on "the grading, culverts, and appurtenances of the Georgia Western Railroad, and the premises or real estate on which said railroad is erected or built, together with the depot grounds and all real estate connected with said road, including the right of way and franchises of the defendant."

This judgment was void, because the court, without the intervention of a jury, had no jurisdiction to determine the questions of fact involved except as to the amount of the debt. The law gave no such lien. The right of way was a fee simple title to lands, and the lands were nowhere described. The franchises of the company were not the subject of levy and sale. It did not appear when the debt became due, nor what the contract was. If the declaration was filed on September 17th, 1874, the judgment was rendered at the appearance term. No effort was made by any of the officers of the company to avert this judgment. Subsequently an execution issued in which the sheriff is commanded to seize the property according to the description in the judgment. On July 3d, 1875, a levy was made as follows:

"Levied the within *f*ि*. fa.* upon one acre of land, more or less, in land lot seventy-eight, of the fourteenth district of Fulton county, lying and being in the first ward of the city of Atlanta, and bounded on the north by Simpson street, east by the right of way of the Western and Atlantic Railroad, south by Rock street, and west by Elliott street. Also, upon a lot containing three acres, more or less, lying and being in the first ward of the city of Atlanta, constituting a part of land lot seventy-eight, in the fourteenth district of Fulton county, and bounded north by Rock street, east by the right of way of the Western and Atlantic railroad, south by Thurmond street, and west by Elliott street, both of said lots in the possession of Georgia Western Railroad Company, and levied on as their property. Also, upon the franchises of the Geor-

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gia Western Railroad Company; also, upon the right of way (having a width of two hundred feet,) and the grading, culverts and appurtenances and the premises or real estate upon which the Georgia Western Railroad is erected or built; which said railroad as graded commences at the city of Atlanta, in the county of Fulton, and extends partly along the line of the Western and Atlantic Railroad, westwardly, through Fulton and Cobb counties, into Douglass county, near and west of Douglassville; said right-of way, grading, etc., in the possession of the Georgia Western Railroad Company, pointed out in the *f. fa.* and levied on as the property of said Georgia Western Railroad Company."

The sheriff has advertised the property for sale at the court-house door in the county of Fulton, on the first Tuesday in March, 1876. The advertisement, in the description of the property proposed to be sold, follows the levy. The mere right to use and occupy the right of way of the Western and Atlantic Railroad, was granted to the Georgia Western Railroad Company, and cannot be sold. Much of the work for which defendants claim a lien was done upon such right of way. The lands lie in three different counties. The sheriff proposes selling them all at the court-house door of Fulton county. The franchises of the company cannot be sold by the sheriff. The company has other creditors besides defendants, who are unknown to complainant. If the defendants are allowed to make the sale as advertised, the property will necessarily be sacrificed. The complications surrounding it are so great that purchasers would be unwilling to bid or pay anything like the value of the property. The sale, if made, will cast a cloud upon the title, and will effectually defeat the entire enterprise.

The officers and managers of the company, who are trustees for the stockholders and creditors, are making no effort to prevent this unlawful sale. Unless interference should come from some other quarter, the sale will be made. The large interest, whether it be as a stockholder or a creditor, that this complainant has in the trust property and fund which are

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about to be destroyed and lost, and the great public interests involved, entitle this complainant, as it respectfully insists, to be heard in reference thereto. All of the property levied on is essential to the enjoyment of the franchise of the company. The road cannot be constructed and used without this property.

Complainant prays as follows: That Grant, Alexander & Company, and A. M. Perkerson, sheriff of Fulton county, be made defendants to this bill, and that process issue for them; that the entire proceedings embraced in exhibit A be declared to be void; that the defendants be enjoined from making the contemplated sale, and from interfering with the property; that, if necessary, the creditors of the Georgia Western Railroad Company may make themselves parties; that the company itself be made a party; that the rights of all the creditors, embracing Grant, Alexander & Company, may be ascertained, and if a sale of the property be necessary, that it be made in such manner as may be best for all the parties in interest; and that other and general relief be granted.

Exhibit A embraced the claim of lien, the suit thereon, the judgment, execution, levy and advertisement. From this it appeared that the suit was filed September 17th, 1874, though the process was dated July 17th, 1874, and though the entry of service by the sheriff bore date July 23d, 1874. The declaration on the lien contained also a general count for the sum claimed as balance due on contract. The execution stated the sum for which the judgment was rendered to have been recovered by Grant, Alexander & Company, "by a general judgment and decree of foreclosure of lien."

The answer of the defendants, and the affidavits in support thereof, are omitted as immaterial here. It was satisfactorily shown that the date of the filing of the suit in office, as it appeared upon the original declaration, was a clerical error, and that such suit was in fact commenced early in July, 1874.

The chancellor refused the injunction, and the complainant excepted.

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JOHN L. HOPKINS; W. T. NEWMAN, for plaintiff in error.

CANDLER & THOMSON; A. W. HAMMOND & SON, for defendants.

BLECKLEY, Judge.

The franchise to be a corporation is what constitutes an artificial person. That is breath or being, and not property. You cannot sell it, any more than you can sell the life of a man. But things, and the right to use things for profit, are property, whether in the hands of a corporation or of a natural person. A chartered railroad is property. The rights and privileges conferred by charter to use it as an instrument of transportation, are also property; for they adhere to it as accessories or incidents, and adds to its value. Indeed, they give it its chief value. Without them, the railroad, as such, would be almost, or quite, useless. To own it, would be like owning a horse, with no right to ride him, or drive him—no right to put him to labor. This would be owning materials, merely; the iron and timbers, the earth and masonry, of the railroad; or the hide and flesh and bones of the horse.

Whatever belongs to a corporation is subject to be applied to the payment of its debts. It has no exempt property. In this state, only the heads of families are entitled to withhold any of their assets from creditors. All other debtors must pay if they can. Their property, both legal and equitable, is all subject. What cannot be reached by strictly legal process, may be brought in by appealing to the powers of a court of equity, or to the equitable powers of a court of law. Under our peculiar system, the latter court may generally administer as ample relief as a court of equity; and such relief, we think, may be reached, in the present case, by amending the judgment. But, for the reasons indicated in the third and fourth headnotes, the denial of the injunction was proper.

Judgment affirmed.

Farrell *et al.* vs. The Commissioners, etc., of Floyd County.

WILLIAM FARRELL *et al.*, plaintiffs in error, vs. THE COMMISSIONERS OF ROADS AND REVENUE OF FLOYD COUNTY, defendants in error.

The act of 1850 (Cobb's Digest, 540,) which provided that compensation be paid physicians summoned to hold *post mortem* examinations at coroners' inquests, out of the county treasury, was superseded by the Code. The power of coroners to summon physicians, at the expense of the county, is now limited to cases where the verdict of the jury suggests death from poison.

County matters. Inquests. Before Judge UNDERWOOD.
Floyd Superior Court. January Term, 1876.

J. W. GLENN, by brief, for plaintiffs in error.

ALEXANDER & WRIGHT, for defendants.

WARNER, Chief Justice.

This was an application by two physicians for a *mandamus* to compel the commissioners of roads and revenue of Floyd county to pay them their respective accounts for attending two coroner's inquests and making *post mortem* examinations of two persons who came to their death by external violence. The court refused the *mandamus*, and the plaintiffs excepted.

The only question in this case is, whether the act of 1850 (Cobb's Digest, 540,) is now of force, or whether it was superseded by the Code of 1863. In our judgment, the act of 1850 is superseded by the Code of 1863, which is the same as in Irwin's Revised Code and in the Code of 1873, so far as relates to the examination of dead bodies by physicians at coroner's inquests at the expense of the county: New Code, section 4109. The codifiers of the Code of 1863 entered upon the subject matter of coroners' inquests and physicians' fees and regulated the same; the general assembly adopted their report as the law of the state in relation to that subject, which is to be found in the 4109th section of the Code of 1873. That section declares that "if the verdict of the jury

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suggests that the death was caused by poison, the coroner shall have power to cause an accurate examination of the contents of the stomach and intestines by skilful physicians, and the reasonable expenses of such examination shall be paid out of the county treasury." This appears to be the latest legislative declaration as to the power of coroners to cause physicians to examine dead bodies at coroners' inquests, at the expense of the county, which does not include the examinations made by either of the relators.

Let the judgment of the court below be affirmed.

BENEDICT, HALL & COMPANY, plaintiffs in error, *vs.* JOHN N. WEBB, defendant in error.

1. Property mortgaged in 1870 without any waiver of homestead, being claimed as a homestead in 1871, the mortgagee, who had filed objections, withdrew the same and granted further indulgence, on condition that the homestead be set apart subject to the mortgage, which was done accordingly, and the mortgagor's wife died in a few days thereafter: he having no minor children, the specific homestead right concerning which the parties made their agreement terminated for all time.
2. Afterwards, the mortgagor married again, went into bankruptcy, and, in 1875, procured the same property to be set apart to him by the assignee in bankruptcy, as a homestead: this second homestead, being based on the existence of a new family, is lawful; is unaffected by the agreement touching the first; and, so long as it exists, the property is not subject to levy and sale under the mortgage.

**Homestead. Waiver. Mortgage. Before Judge WRIGHT.
Upson Superior Court. November Term, 1875.**

Report unnecessary.

J. A. COTTEN, for plaintiff in error.

M. H. SANDWICH; SPEER & STEWART, for defendant.

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BLECKLEY, Judge.

The debt was contracted without waiver of homestead. The creditor, however, resisted when the debtor sought to have a homestead set apart to him out of the mortgaged property. An adjustment of the controversy took place, and the homestead was set apart, subject to the mortgage. We cannot discover from the record, that the stipulation between the parties embraced any homestead right, other than the one then being asserted. The homestead estate then in question, was not to be superior to the mortgage. That estate depended upon the life of the debtor's wife, she being the only member of his family within the peculiar protection of the homestead law. There were no minor children. When she died, the estate terminated : 47 *Georgia Reports*, 629. The subject in reference to which the parties stipulated went out of existence. All the homestead proceedings had spent their force ; and the property was left as if no homestead had been taken. This being so, was the debtor, upon marrying again, restrained by the letter or the spirit of his contract, from asserting the new homestead right which resulted from his again becoming the head of a family ? The question is not without difficulty, but our best opinion is that he was not. It seems to us that the two homestead rights were quite distinct ; that one of them, and it alone, was the subject of the contract ; and that the other was not, in any way, anticipated or provided for. The contract was not general but specific—the homestead then applied for was to be granted, subject to the mortgage. The debtor is not using anything growing out of that grant of homestead, to resist the mortgage. He sets up altogether a new right, and supports it by the assignment of the homestead which he procured to be made in bankruptcy.

Judgment affirmed.

Goodman *vs.* Fleming.

JOHN S. GOODMAN, plaintiff in error, *vs.* **T. J. FLEMING**, defendant in error.

1. A demurrer to a suit on a promissory note by the indorsee thereof, in his own name, on the ground that the ~~re~~ were no words of negotiability in the note, was properly overruled.
2. A plea which set up agreements not contained in the note, and in contradiction thereof, was properly stricken.

Promissory notes. Indorsement. Pleadings. Evidence.
Before Judge CRAWFORD. Harris Superior Court. April Term, 1876.

Reported in the decision.

L. L. STANFORD, by brief, for plaintiff in error.

JAMES M. MOBLEY, by M. H. BLANDFORD, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff, as indorsee of a promissory note without any negotiable words in it, against the defendant. At the trial of the case, the defendant demurred to the plaintiff's declaration on the ground that the indorsee of a promissory note, without negotiable words in it, could not maintain an action thereon in his own name. The court overruled the objection, and the defendant excepted. The plaintiff then demurred to the defendant's second plea which the court sustained, and the defendant excepted.

1. The question made by the first assignment of error was decided by this court, in the case of *Cohen vs. Prater*, 56 *Georgia Reports*, 203, adversely to the plaintiff in error in this case.

2. The plea of the defendant alleged that the note was given upon certain agreed terms and conditions not expressed in the note, and in contradiction thereof. There was no error in sustaining the plaintiff's demurrer to the defendant's plea.

Let the judgment of the court below be affirmed.

Beck *vs.* The State of Georgia.

DAVID L. BECK, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. According to the evidence, there was, at the time of the homicide, no such imminent danger to the prisoner's person or property as to render the killing absolutely necessary for the defense of either; nor was there any assault upon the prisoner, or any attempt to commit a serious personal injury upon him, or anything equivalent thereto to justify the excitement of passion and to exclude all idea of deliberation or malice.
2. Even in a case of capital punishment, the verdict may be left to stand though some competent evidence was excluded on the trial, if it be perfectly clear, beyond all doubt, that the conviction and punishment would be no less rightful with the excluded evidence in than with it out: *14 Georgia Reports, 43; 35 Ibid., 303.*

Criminal law. Evidence. New trial. Before Judge UNDERWOOD. Chattooga Superior Court. March Term, 1876.

Beck was indicted for the murder of R. H. Shamblin.

On the trial, the evidence for the state was, in brief, as follows: On the morning of October 28th, 1875, one McEntyre was working in a corn-field in Chattooga county. He saw defendant get up from behind a tree just outside the enclosure, with a gun in his hands. Defendant ordered him to leave the field; then getting over the fence, inquired for Shamblin. McEntyre replied that he did not know where Shamblin was. Just then defendant saw Shamblin several yards distant, crossing the field; and saying, "By-God, yonder he is now," walked towards and met him. Defendant raised his gun and said "Stop, God-damn you, stop!" Shamblin replied, "I am stopped; don't shoot." The defendant then turned the gun over, as if to strike with the breech, and walked up close to Shamblin. The latter said, "Don't do that, Mr. Beck, I am going to Mrs. Claudis'; I don't want a fuss with you;" and started to walk away. Defendant raised his gun and fired; they were about four or five paces apart. Shamblin screamed, and ran to the house of Mrs. Claudis, which stood near by. Here he was put in bed, and medical attendance summoned. He died about one or two o'clock the

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following night. His death was the result of the wounds. Deceased had nothing in his hands when shot.

The evidence for the defendant was, in brief, as follows:

Defendant and Shamblin each claimed title to the corn growing in the field in which the homicide occurred. They were involved in litigation about it, each party having taken out possessory warrants against the other, and Shamblin a warrant against Mrs. Beck, defendant's wife. A short time previous to the killing, defendant was arrested under a warrant sued out by Shamblin. The latter, about the time of the arrest, stated to several parties that he intended to have the corn, if it cost him his life; that defendant was a coward and could be frightened with a pen-knife, and other equivalent expressions. One witness (Ragland) testified that Shamblin said he would have the corn or "cut Beck's guts out." McEntyre was employed by Shamblin to gather the crop in dispute.

Defendant's statement was, in substance, as follows :

Had no intention of shooting Shamblin when they met in the field. When the latter said "don't shoot," turned the butt of the gun towards him; told him to get out of the field; he replied that he would "when he got ready." When defendant fired Shamblin had a knife in his hand, and was apparently about to spring upon defendant.

The jury found a verdict of guilty. Defendant moved for a new trial on substantially the following grounds :

1st. Because the verdict was contrary to law and the evidence, and without evidence to support it.

2d. Because the court refused to allow Ragland, a witness for the defense, to testify as follows: Defendant sent word by him to the deceased that he did not want any fuss or trouble with him, and that he hoped the contest about the corn would be peaceably settled; and it was in reply to this that deceased said that he would have the corn or "cut Beck's guts out." The answer was admitted, but the message excluded.

The motion was overruled, and defendant excepted.

Beck *vs.* The State of Georgia.

J. M. BELLAH; J. G. GLENN; DABNEY & FOUCHE, for plaintiff in error.

C. T. CLEMENTS, solicitor general; ALEXANDER & WRIGHT, for the state.

BLECKLEY, Judge.

1. We have searched the evidence in vain for any fact that made the homicide necessary at the time it was committed, or that would justify it, or reduce it below the grade of murder. There was bad feeling between the parties; they were in an ill-tempered controversy about property; the deceased had used improper language while the controversy was pending, showing a determination to maintain his supposed rights by violence; but he had not gone to the extent of committing a breach of the peace, and we cannot discover from the evidence that he attempted or intended any act of hostility against the prisoner at the time the prisoner slew him. What he said was said on previous occasions. At the last fatal interview, he seems to have behaved with propriety, and neither by word or deed, to have given the prisoner cause to attack him. He had not forfeited his life; and in taking it, the prisoner assumed the grave responsibility which is about to overwhelm him.

2. It is not clear that some little evidence excluded by the court was not admissible. Perhaps it was admissible; but whether it was in or out could have made no difference in the result. None of the excluded evidence bore directly on the main transaction; it did not relate to what took place on the occasion of the homicide. The whole strength of the case is, that under the circumstances then and there existing, there was no good reason for killing the deceased—that the killing might have been let alone by the prisoner, and that he, nevertheless, committed the homicide. The evidence kept out would not have changed the real case one iota. There is no cause in the record for granting a new trial.

Judgment affirmed.

Birdsong *vs.* Woodward.

SUSAN F. BIRDSONG, plaintiff in error, *vs.* **JOHN S. WOODWARD**, for use, defendant in error.

(BLECKLEY, Judge, having been of counsel, did not preside.)

The provision in the constitution of 1868, giving the judge power to render judgment without the intervention of a jury, where no issuable defense is filed on oath, is not retroactive. Therefore, an appeal having been entered prior to the adoption of such constitution, it was error for the court to render judgment against the principal and security without submitting the case to a jury.

Judgments. Evidence. Constitutional law. Before Judge WRIGHT. Upson Superior Court. November Term, 1875.

Reported in the decision.

POE, HALL & LOFTON; RUTHERFORD & RUTHERFORD; W. S. WALLACE; S. HALL, for plaintiff in error.

W. A. HAWKINS; SPEER & STEWART; PEEPLES & HOWELL, for defendant.

WARNER, Chief Justice.

This was a claim case, on the trial of which, the jury, under the charge of the court, found the property subject to the execution levied thereon. A motion was made for a new trial on the several grounds alleged therein, which was overruled by the court and the claimant excepted.

It appears from the record and bill of exceptions, that on the trial of the case, the plaintiff offered in evidence a judgment awarded by Judge Buchanan in an appeal case, which had been entered prior to the adoption of the constitution of 1868, and a *fi. fa.* issued thereon, which had been levied on the property claimed, against N. F. Walker, and James P. Walker, his security on the appeal, it being recited in the judgment that there was no issuable plea filed on oath. To the admissibility of this evidence, the claimant objected and demurred to the same, on the ground that the judgment was

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void, not having been entered on the verdict of a jury. The court overruled the demurrer to the evidence thus offered by the plaintiff, and admitted the same to be read to the jury, and that is one of the grounds of error alleged in the motion for a new trial.

The question involved in this assignment of error, was decided during the present term, in the case of *Walker vs. Birns et al.*, and must control this case.

Let the judgment of the court below be reversed.

STEPHEN COLLINS, plaintiff in error, *vs.* GRANTHAM J. TAGGART, defendant in error.

If the debtor, recently after conveying to the claimant absolutely, is in possession of the premises, and so continues until the levy is made, his possession, in the absence of evidence to show when or how it commenced, may be presumed to have existed at the date of the conveyance; and such continuous possession, unexplained, is a badge of fraud.

Levy and sale. Title. Presumption. Fraud. Before Judge TOMPKINS. Bibb Superior Court. October Adjourning Term, 1875.

A *fi. fa.* in favor of Taggart against one Cherry, dated November 30th, 1874, was levied on certain property in the city of Macon, and Collins interposed claim.

On the trial, the evidence for plaintiff made, in brief, the following case:

The *fi. fa.* was levied on the property in dispute March 8th, 1875. At the time of the levy, and for some months prior thereto, defendant in *fi. fa.* was in possession of the property. In 1874 and 1875 he was conducting an auction business on the premises, and so continued to the time of the trial.

Claimant introduced a deed from Cherry to him, dated February 25th, 1874, recorded February 9th, 1875, wherein

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said Cherry, in consideration of \$10,000 00 "in hand paid," conveyed to claimant a lot of land including that now in dispute.

The jury found the property subject. Claimant moved for a new trial on the following, among other grounds:

1st. Because the court gave the following in charge: "Proof of the execution, the levy under it, and that the defendant was in possession of the property levied on at the date of the levy, makes out a *prima facie* case for the plaintiff."

2d. Because the court charged as follows: "You will also look to the evidence to see if there are any badges of fraud, or circumstances going to show that the deed from Cherry to Collins is not valid and *bona fide*," reading to the jury in this connection sections 1952 and 2751 of the Code, but failing to explain what is meant by "badges of fraud," or under what circumstances possession is a badge of fraud.

The motion was overruled, and claimant excepted.

LANIER & ANDERSON, HILL & HARRIS, for plaintiff in error.

R. F. LYON, for defendant.

BLECKLEY, Judge.

The debtor, before judgment went against him, made a deed, conveying certain property to the claimant. The evidence does not disclose, in any direct way, who was then in possession, or whether the possession was delivered to the claimant or not. Not long after the conveyance was executed, the debtor was in possession, and he so remained until the property was levied upon. As it is not shown that this possession commenced after he conveyed to the claimant, the fair presumption is that it existed at that time. He was then the owner, and where no adverse holding appears, the general presumption is, that the true owner has possession of his property: *7 Georgia Reports*, 387; *20 Ibid.*, 312, 681. He was

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afterwards found in actual possession, and was in at the time of the levy. The evidence gives no intimation that he had gone out and returned. The possession proved is, therefore, to be taken as a continuation of the same possession which existed at the time of the conveyance. There is no explanation of this continued possession, and that being so, it is a badge of fraud; 2 *Kelly*, 1; 6 *Georgia Reports*, 103, 365; 10 *Ibid.*, 242; 20 *Ibid.*, 429, 600.

Judgment affirmed.

CATHARINE W. CHICK, plaintiff in error, *vs.* THE SOUTHWESTERN RAILROAD COMPANY, defendant in error.

(JACKSON, Judge, having been of counsel, did not preside in this case.)

1. Where plaintiff's declaration claimed damages for the loss of services of her minor son, who was injured on defendant's road, the further allegation, by way of showing the aggravated nature of the *tort*, that death resulted from such injuries, does not change the nature of the action so as to make it a suit for the homicide of the son. For the former she could recover; for the latter she could not.
2. Where the statement of facts in the declaration amounted to a *prima facie* case of felony on the part of defendant's agents, and there was no allegation either that any prosecution had been instituted therefor or that there was good cause for the failure so to do, a demurrer to such declaration was properly sustained.

Torts. Damages. Railroads. Practice in the Superior Court. Before Judge HILL. Houston Superior Court. November Term, 1875.

Reported in the decision.

WOOTEN & SIMMONS; A. O. BACON, for plaintiff in error.

R. F. LYON; A. R. LAWTON, for defendant.

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WARNER, Chief Justice.

The plaintiff brought her action against the defendant to recover damages for the loss of the services of her minor son, John W. Chick, who, she alleges, was being carried on defendant's road as an express messenger from the city of Macon to the city of Columbus, and whilst being so carried, was, on the 23d day of October, 1873, by the carelessness, negligence and fault of said defendant, and without fault or negligence on his part, by a *collision of its trains* running on the defendant's road, wounded, bruised, and injured in and upon the head, producing a fracture of his skull, and in and upon other parts of his body, of which said wounds, bruises, and injuries, the said John W. Chick then and there lingered until the 27th of October, 1873, when he died; that her son was of the age of twenty years, and his services were due to her as the sole surviving parent, and were of the annual value of \$1,000 00; that she has been compelled to pay out and expend the sum of \$200 00 for medical services and attention during his last illness, etc. The defendant demurred generally to the plaintiff's declaration. The court sustained the demurrer on the ground that no one in this state can bring suit for damages sustained by a homicide but the persons named in the 2971st section of the Code; whereupon the plaintiff excepted.

1. According to the ruling of this court in *Shields vs. Yonge*, 15 *Georgia Reports*, 349, the reason given by the court below for sustaining the demurrer to the plaintiff's declaration was not a good legal reason, in view of the allegations contained therein. The plaintiff did not seek to recover damages for the homicide of her son as provided by the 2971st section of the Code. The plaintiff sought to recover damages for a *tort* committed by the defendant to her minor son, under the provisions of the 2960th section of the Code, and because she alleged that her son died from that *tort*, so committed by the defendant, by way of aggravation, it does not follow that her action was brought for the homicide of her son, under the provisions of the 2971st section. That section of the Code

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gives the right of action to the persons therein named to recover for the homicide of a husband or parent, and that is all that it does declare in relation to a recovery for the homicide of anybody. The homicide of a husband or parent is made by the statute a special cause of action in favor of the persons therein named, and is limited to them, as was held by this court in the *Georgia Railroad Company vs. Wynn*, 42 *Georgia Reports*, 331. In that case, there was a *special* demurrer to the plaintiff's declaration on two grounds, one of which was: "Because a husband cannot recover damages for the death of his wife." The distinct question presented by the special demurrer in that case, and decided by the court, was whether a husband could recover damages for the death or homicide of his wife under the provisions of the 2971st section of the Code, and it was held that he could not, and that was the only question decided in that case in relation to the plaintiff's right to recover under that section. The case now before the court is not an action brought by the plaintiff to recover damages for the homicide of anybody under the provisions of the 2971st section, but it is an action brought by the plaintiff to recover damages for the loss of the services of her son in consequence of an alleged *tort* committed by the defendant, as provided by the 2960th section of the Code. The fact that the plaintiff alleges in her declaration that her son died in consequence of the *tort* committed by the defendant by way of showing the aggravated character of that *tort*, does not make it an action to recover for the homicide of her son under the provisions of the 2971st section. The foundation of the plaintiff's action in this case is to recover damages for the loss of the services of her son, under the provisions of the 2960th section, and not to recover under the 2971st section of the Code for the homicide of her son, and her right to do so is authorized by the decision of this court in *Shields vs. Yonge*, before cited, on complying with the requirements contained in the 2970th section of the Code, inasmuch as the *tort* complained of in the plaintiff's declaration was such an act of criminal negligence on the part of the defendant and its agents

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as, *prima facie*, at least, amounts to a felony: See *Allen vs. Atlanta Street Railroad Company*, 54 *Georgia Reports*, 503. It will be noticed that the decision in the case of *Shields vs. Yonge* was made prior to the adoption of the Code, in which the 2970th section is now incorporated as a part of the prescribed law of the state. The homicide of the plaintiff's son by the defendant and its agents, was undoubtedly a *tort*, in the general sense of that term, but it was not that class of *torts* contemplated by the 2960th section, under which this action was brought. The *torts* contemplated by the 2960th section, are that class of *torts* for which damages could have been recovered at common law for loss of service of the wife, child, ward, or servant. The 2971st section gives to certain persons therein named the right to recover for the homicide of a husband or parent, without regard to the loss of service as a cause or foundation for the action. In other words, the statute gives to certain described persons the absolute independent right to recover for the homicide of a husband or parent, which did not exist at common law without alleging any loss of service.

2. Although the plaintiff has not brought her action to recover for the homicide of her son, still it appears on the face of her declaration that the death of her son resulted from the *tort* of which she complains, thereby showing a statement of facts which *prima facie* amounts to a felony on the part of the defendant's agents, and inasmuch as there is no allegation that any prosecution has been instituted against them or any excuse for failing to do so, as required by the 2970th section of the Code, and the demurrer being general to the entire declaration, we affirm the judgment of the court below sustaining the defendant's general demurrer, with leave to the plaintiff to amend her declaration if she shall think proper to do so.

Judgment affirmed.

Cherry *vs.* The Home Building and Loan Association.

WILLIAM A CHERRY, plaintiff in error, *vs.* THE HOME BUILDING AND LOAN ASSOCIATION, defendant in error.

It is not the office of a rule absolute foreclosing a mortgage, to show expressly on its face, what particular credits were allowed in fixing the amount of the debt, more especially, where the credits are not mentioned in any of the pleadings; and a motion by the mortgagee, made a year after the rule was granted, to amend it for the sole purpose of declaring that a certain credit not pleaded was, in fact, allowed, is irregular and ought to be overruled.

Judgments. Mortgages. Practice in the Superior Court. Before Judge HILL. Bibb Superior Court. October Term, 1875.

The Home Building and Loan Association foreclosed several mortgages on the property of Cherry, and rules absolute were issued at the April term, 1874, of Bibb superior court. At the October term, 1875, plaintiff moved to amend said rules by inserting in each the statement that the amount adjudged to be due was the balance, after giving Cherry credit for the value of the stock held by him in the association, on which he had obtained from plaintiff the loans which formed the consideration of the mortgages. No mention of such credits appeared in the petitions or rules *nisi* to foreclose.

By consent of counsel the cases were tried together.

Defendant demurred to plaintiff's motion on the following grounds:

1st. Because the court had no jurisdiction to grant the relief prayed for.

2d. Because there was nothing in the petition or rule *nisi*, on which the foreclosure was based, to authorize such a judgment as would be rendered by the introduction of the proposed amendment.

3d. Because the motion was indefinite, and failed to state the amount of the alleged credits.

The demurrer was overruled and defendant excepted.

WHITTLE & GUSTIN, for plaintiff in error.

LANIER & ANDERSON, HILL & HARRIS, for defendant.

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BLECKLEY, Judge.

A judgment cannot be amended by introducing matter which the law does not require to appear in it. Especially would such a practice be inadmissible where the pleadings, as made up when the judgment was rendered, are silent touching the matter with which the amendment proposes to deal. The rule absolute, as originally taken, was in terms of the Code, section 3968. The court gave judgment for the amount which was due on the mortgage. What credits were allowed in arriving at that amount, may be open to inquiry in other proceedings, but the office of the judgment is to speak the debt, not to show the credits. It would have been unusual and unnecessary to set out the credits in the judgment, had that been done when the judgment was rendered. The omission to do it then is no cause for doing it now.

Judgment reversed.

JOHN N. BEACH & COMPANY, plaintiff in error, *vs.* **BRANCH,
SONS & COMPANY**, defendants in error.

1. It is error for the court to read and refuse the defendants' requests to charge in the presence of the jury, and to accompany the refusal with such remarks as were calculated to prejudice the defense.
2. An action by the purchaser of cotton against the seller, to recover for the defective quality of the article sold, must be brought within four years of the discovery of the defect.
3. If the plaintiff was not in fact the purchaser, but was simply an agent to whom the cotton was consigned, to be sold on commission, and if after it was sold, and the account between him and defendants settled by draft, he was compelled to refund to the purchaser on account of the false packing of some of the cotton, he can recover therefor from the defendants, but reclamation must be made according to the custom of the business, within such reasonable time as would enable the defendants to reclaim from the parties from whom they purchased. What would be a reasonable time would be for the jury to decide, under the charge of the court.

Charge of court. Principal and agent. Statute of limitations. Before Judge GOULD. City Court of Augusta. May Term, 1876.

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The following, taken in connection with the decision, sufficiently reports this case :

The court was given a number of requests to charge by defendants' counsel. He charged the first, which was as follows : "Agents are bound for the utmost good faith to their principals, and if by neglect of duty the principal cannot recover for money advanced by such agent, then the agent cannot recover from the principal." He read the other requests in the hearing of the jury, but refused to charge them, remarking that some of them were good law, but he did not see how they were applicable to this case.

BARNES & CUMMING, for plaintiff in error.

FRANK H. MILLER, for defendants.

WARNER, Chief Justice.

It appears from the record in this case that John N. Beach, of Liverpool, England, doing business under the name of John N. Beach & Company, brought his action of assumpsit against Branch, Sons & Company, in the city court of Augusta. Defendants acknowledged service December 18th, 1874. At the first term they pleaded the general issue, and at the May term, 1876, when the case was tried, they filed additional pleas, viz: statute of limitations ; that loss was caused by plaintiff's own negligence, as agent ; that he committed the most fault, and failed to furnish defendants, in a reasonable time, with evidence to protect themselves.

The material facts are these : Defendants shipped in January, 1870, by the ship Victory, from Savannah, ninety-three bales of cotton to plaintiff, in Liverpool. The cotton was to be sold on account of shippers, and plaintiff was to receive two and a half per cent. for commissions, of which two and a half per cent. commissions one per cent. was to be returned to defendants. The cotton was sold in Liverpool on contract of February 1st, 1870, and delivered April 13th, 1870, and the account between the plaintiff and defendants was settled by

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draft of plaintiff, duly honored by defendants, on or about June 11th, 1870, drawn May 20th, 1870.

After the draft was drawn, and account rendered, to-wit May 30th, 1870, ten bales of cotton were returned by the purchaser to Mr. Beach, in Liverpool, as "false packed," the false packing consisting in the admixture of inferior with good cotton, the ten bales having been paid for at the price of good cotton. The fact of false packing was found to be true by arbitrators, under the custom of Liverpool, who, in pursuance of the custom, rendered an oral award to that effect.

Thereupon, Chambers, Holder & Company, the Liverpool brokers employed by Mr. Beach to sell the cotton, took back the ten false packed bales, refunded the price to the purchaser, May 31st, 1870, re-sold the ten bales at the market price, July 30th, 1870, and notified Mr. Beach accordingly. This notification was received by him about July 30th, 1870. Beach was absent from Liverpool, in America, until June 30th, 1870, seeing defendants personally frequently. July 30th, 1870, he wrote the defendants a letter, which, after treating of other matters, at the end contained the following language: "There are ten bales of cotton, marked V. O. X., part of receipt by Victory, returned to us as false packed, which we have re-sold at six and a half, and will send account for same by first steamer."

This letter was duly received by defendants. Mr. Beach wrote no more on this subject; neither did defendants write to him asking any further information as to planters' marks, numbers, or other means of identification of the false packed bales.

Mr. Beach paid to Chambers, Holder & Company the deficit due them on the transaction, December 30th, 1870. The action was brought to recover from the defendants the amount of this payment, with interest, made by plaintiff to Chambers, Holder & Company.

The custom of Liverpool requires that reclamation by the purchaser for false packed cotton, should be made on the Liverpool seller within three months and ten days. There was

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no evidence of a custom fixing the time within which reclamation should be made on the American shipper.

Mr. Dunbar, a cotton merchant of Augusta, Georgia, of large experience, testified for defendants that sworn statements should be furnished of the facts upon which the reclamation was sought, and that without such statements he would pay no attention to the reclamation. He would not think it his duty, when he was notified in general terms that the cotton was deficient, to seek the particular facts of the deficiency. He would wait for the Liverpool man to furnish them.

Mr. Russell, also a cotton merchant of Augusta, of large experience, testified for defendants, that sworn statements ought to accompany the reclamation, but that if he were informed in general terms of a deficiency, he considered it his duty to seek from the Liverpool party making the reclamation, such facts as he needed for his own protection.

Mr. Thomas P. Branch, one of the defendants, testified that ninety-three bales of cotton were purchased from twelve or thirteen different persons, and the plaintiff had not furnished him, up to the time of his testimony, with any sufficient information to enable him to say from what parties he had received the ten false packed bales. He said it was too late to make reclamation now on parties from whom defendants bought. Could have done so if proper information had been furnished by plaintiff. Never called on plaintiff for such information.

On the trial of the case, the jury found a verdict for the plaintiff for the sum of \$463 64 with interest from the 30th of November, 1874. The defendants made a motion for a new trial on the several grounds therein set forth, which the court granted on the ground alone that it erred in reading the defendant's requests to charge the jury, in their hearing, and then refusing the same; whereupon the plaintiff excepted.

The defendants also excepted because the court did not grant the new trial on all the grounds taken in the motion.

1. The court did not simply read and refuse the defendant's requests, but accompanied the refusal with such emphatic re-

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marks as were calculated to prejudice the minds of the jury against the defendants' defense. The court, however, has corrected its own error in regard to that ground of the motion.

2. The motion for a new trial should also have been granted upon the ground that the case was not fairly submitted to the jury by the court, in its charge as to the law applicable thereto, so far as the defendants' rights were concerned. If the relation of vendor and vendee existed between the parties, as to the sale of the cotton, then there was an implied warranty on the part of the defendants that the cotton was a merchantable article, and that they knew of no latent defects in it at the time of the sale, undisclosed, and an action for a breach of that implied warranty on the part of the defendants, should have been brought by the plaintiff against them within four years from the time it was discovered the cotton was false packed, or the plaintiff's right of action would have been barred.

3. But if the relation of vendor and vendee did not exist between the parties in relation to the sale of the cotton, and the plaintiff was merely the agent of the defendants to sell the cotton in Liverpool, then it was the duty of the plaintiff, as such agent, within a reasonable time, after receiving notice that the cotton was false packed, to have notified the defendants, his principals, of that fact, and to have furnished them with sworn statements as to the condition of the cotton, according to the custom of the trade, so as to have enabled the defendants to seek indemnity from the parties from whom they purchased the false packed cotton. If the plaintiff, as the agent of the defendants, failed, for an unreasonable length of time, to give them notice that the cotton was false packed, or failed to furnish them with the customary evidence of that fact, (the more especially as the plaintiff promised to send an account for the same by the first steamer, in his letter of the 30th of June, 1870,) whereby the defendants were barred by lapse of time from recovering damages against the parties from whom the false packed cotton was purchased by them, then the plaintiff would not be entitled to recover. The

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reasonableness or unreasonableness of the time within which the plaintiff acted in relation to the cotton, as above indicated, will be a question for the jury, under the charge of the court, and about which we express no opinion.

Let the judgment of the court below be affirmed.

JASPER N. ALDERMAN, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. An indictment for larceny after trust, under section 4422 or 4224 of the Code, which charges that defendant did fraudulently convert the goods entrusted to him to his own use, need not charge that the same was done without the consent of the owner or bailor, and to his injury, and without paying him on demand the full value thereof; these clauses of the sections, or either of them, apply to other disposition of the goods than to the bailee's fraudulent conversion to his own use, and need only be charged and proven in such cases.
2. The identity of the hog and time of the larceny are sufficiently proven, and the description as a black male hog, the property of John G. Blitch, in the indictment, is sufficient, and proof that the hog was marked does not contradict such description.
3. Where the question is whether a fraudulent conversion took place in Bulloch county, and one witness, who was not present at the conversion, testifies to several circumstances, adding, "was in Bulloch county," and the witness who saw the act of conversion does not locate it in any particular county, the venue of the crime is not sufficiently proved.

JACKSON, Judge, dissented from last point and judgment of reversal, as follows:

1. Public policy requires the rigid enforcement of the criminal law, especially in respect to all larceny from farmers of the provisions they are trying to raise.
2. The words "was in Bulloch county," used by the bailor of the hog, and who proved confession of guilt, mean that the crime was committed in that county. The testimony in such cases, in circuit practice, is usually rapidly written down. What the bailor said, to-wit: "Was in Bulloch county," with the evidence of the other witness that defendant said he had charge of bailor's hogs, and that he killed the black hog in the field, and got him, the witness, and another, to go after it at night, and cleaned it at witness' house, and they ate the hog, which was of good size, and worth five dollars, is, in my judgment, ample to sustain the venue, and the verdict and judgment of the court, especially as it does not appear in the record

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that any point was made on the venue on the jury trial in the court below, or in the motion for a new trial.

Criminal law. Indictment. Before Judge TOMPKINS.
Bulloch Superior Court. April Term, 1875.

Alderman was indicted for the offense of larceny after trust. The indictment, after charging the crime in general terms, contained the following specific allegations: "For that the said Jasper N. Alderman, in the county of Bulloch and state of Georgia aforesaid, on the first day of May, in the year of our Lord 1872, was then and there entrusted by one John G. Blitch with one hog of the male sex, of the value of \$10 00, the property of John G. Blitch—a black hog—for the purpose of applying the same to the use and benefit of him, the said John G. Blitch, and after having been entrusted as aforesaid, afterwards, to-wit: in the county and state aforesaid, on the first day of October, 1872, did then and there wrongfully and feloniously convert the said one black hog to his own use, without the consent of the said John G. Blitch, the owner thereof, and to his injury, and without paying to him the full value or market price thereof."

On the trial the following evidence was introduced:

1st. The evidence of prosecutor, John G. Blitch, which was, in brief, as follows: Entered into an agreement about January, 1872, with prisoner, by which he was to take charge of witness' hogs and feed them; he was to have no interest in them, but was to receive a third of those that should be raised by him; a settlement was to be had at the end of the year. Under this agreement witness turned over to prisoner some twenty or thirty marked hogs; there were some black ones among the number; sent him word not to kill any of them. Prisoner did not come for a settlement at the end of the year; no settlement was had; could never see prisoner. He had the hogs under his control in October, 1872. Some time afterwards prisoner came to witness for a settlement. He then stated that he had killed one of witness' hogs. Witness found no hogs that had been raised, and but few that were

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on hand at the time of the agreement. "Confession of prisoner was made to me after he was indicted. Hogs lost were grown. Books showed some thirty marked hogs, and found about twelve or fifteen. Did not account for the lost hogs. Was in Bulloch county, Georgia."

2d. The evidence of Tom Anderson, which was, in brief, as follows: Knows Blitch; also prisoner; heard the latter say he had charge of the former's hogs; prisoner stated to witness that he had killed one of Blitch's hogs, and asked him and one Moore to go to the field, where it was, after it; they went for it about an hour after dark, when their day's work was done; he cleaned it at witness' house; prisoner ate the hog; gave witness some of it; can't say how long since this happened; cannot tell value of hog.

The jury found a verdict of guilty.

Defendant moved for a new trial on the following, among other grounds:

1st. Because the verdict was contrary to law and the evidence, and without evidence to support it.

2d. Because the verdict was contrary to the charge of the court, there being no evidence to show that the particular hog described in the indictment was the one that Alderman killed, the court having charged that the *allegata* and *probata* should correspond.

The motion was overruled, and defendant excepted.

MELDRIM & ADAMS, for plaintiff in error.

A. R. LAMAR, solicitor general, for the state.

JACKSON, Judge.

The facts reported, and the principles announced in the head-notes, will show the opinion of the court, as well as my own, in this case.

Judgment reversed.

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THE MAYOR AND COUNCIL OF THE CITY OF GRIFFIN *et al.*,
plaintiffs in error, vs. INMAN, SWANN & COMPANY, de-
fendants in error.

1. An amendment, passed in 1859, to the charter of a city, granting to the mayor and council authority, on the recommendation of a majority of citizens, either in public meeting or by public election, to subscribe for the stock of railroads, to borrow money on the faith and credit of the city to pay the same, and to impose a special tax not exceeding one-half of one per cent. in any one year to meet such debt created, was not repealed by that provision in the constitution of 1868 which declares that "No law shall be passed by which a citizen shall be compelled, against his consent, directly or indirectly, to become a stockholder in, or contribute to, any railroad, * * except in the case of the inhabitants of a corporate town or city. In such cases, the general assembly may permit the corporate authorities to take such stock or make such contribution * * *, after a majority of the qualified voters, of such town or city, voting at an election held for the purpose, shall have voted in favor of the same, but not otherwise." Another provision of the constitution expressly saves local acts passed for the benefit of cities and towns, not inconsistent with the supreme law nor with the constitution itself.
2. Construing the amended charter and the constitution together, and making them harmonize in spirit and meaning, the proper mode of taking the sense of the citizens, in 1871, on the question of subscribing for a given amount of stock in a certain railroad, was to order a public election by all the qualified voters of the city, with the privilege to each and every qualified voter to vote for or against the proposed subscription.
3. The votes of a majority voting at such election, though a majority of the whole number of qualified voters did not vote at all, were sufficient to warrant the mayor and council in making the subscription.
4. The authority to subscribe for stock, borrow money and impose future taxes, embraces an implied power to employ the usual and appropriate securities for engaging municipal credit in such cases, which securities are corporate bonds, bearing interest, and negotiable by delivery.
5. It was competent to deliver the bonds, at par, in payment of the subscription, in lieu of raising money upon them by loan and then paying the money in discharge of the subscription, the one mode being substantially the equivalent of the other, when consummated by consent of both contracting parties.
6. That certain conditions prescribed by an ordinance of the city, as preliminary to the right of the railroad company to receive the bonds, had been complied with, was determined affirmatively by the mayor and council, and such determination is binding in the present controversy.
7. The rule that the *bona fide* holder of negotiable securities is protected, applies in the present case, as to the face of the bonds and coupons.

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Whether the stipulation indorsed thereon, expediting the time of payment in case of default in meeting an installment of interest, be operative or not, is not now here for decision.

8. In order for the jury to find that a contract made in another state and to be performed there, was void for usury, the evidence must show that the rate of interest agreed to be taken was in excess of the rate allowed by the law of such state, and to do this, evidence of the legal rate at the time and place of the contract is indispensable.
9. A contract between two corporations is not rendered void by the fact that some of the persons assisting to make the contract and taking part in the performance of conditions and in the acceptance of performance, were officers in both corporations and represented both to the extent of their respective powers.
10. The court is not bound to give effect to the written consent of counsel as to the order, or the time, of trying cases.
11. Where a case is called for trial in its order, and another case standing upon a different docket is tried with it, by consent, the plaintiff in the former case is entitled to open and conclude.
12. A rule of law so general as not to be practically useful at some point where the case presses before the jury, need not be given in charge.

Municipal corporation. Constitutional law. Railroads. Powers. Negotiable securities. Usury. Contracts. Practice in the Superior Court. Charge of court. Before Judge HALL. Spalding Superior Court. August Term, 1875.

Inman, Swann & Company brought assumpsit against the Mayor and Council of the city of Griffin, on forty-three bonds issued by said city to the Griffin, Monticello and Madison Railroad Company, aggregating in amount \$21,500 00.

The defendant resisted a recovery, principally, on the following grounds: Said bonds were issued in payment of a subscription to the stock of said railroad company. They were illegally issued in this: By the 14th section of the act of December 13th, 1859, amending the charter of the city of Griffin, authority was given to the mayor and council, on the recommendation of a majority of the citizens, in public meeting or by public election, to subscribe to the stock of railroads, or such other internal improvements, as may be to the interest and advantage of the city of Griffin; to borrow money on the faith and credit of the city to pay the same, and to impose a special tax of not exceeding one-half of one per

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cent. in any one year, to meet such debt thus created. On the 23d of May, 1871, said mayor and council passed a resolution authorizing the mayor to submit for the ratification or rejection of the legal voters of the city of Griffin, a proposition authorizing and requiring said mayor and council to subscribe \$40,000 00 to the capital stock of said road, on such terms as they may deem for the best interest of said city, at a regular election, on a day to be fixed by said mayor, after giving legal notice thereof. James S. Boynton was then president of said railroad company and mayor of said city. As mayor, he ordered an election at the city hall, on the 29th of June, 1871, in which all legal voters of said city were requested to express their desire by casting their ballots at said election. The resolution did not authorize the mayor to submit the question to the citizens of Griffin as required by the charter, but to the legal voters. Under the charter, only such were legal voters as were of the age of twenty-one, and who had duly registered as legal voters. For the year 1871, there were registered as legal voters, three hundred and seventy-eight white voters, and three hundred and three colored voters, making six hundred and eighty-one, and only three hundred and two voters voted for subscription, and thirty-eight against it, making an aggregate of three hundred and forty votes polled at said election. On the 11th day of July, 1871, said mayor and council passed an ordinance authorizing the mayor to subscribe for four hundred shares of the stock of said company, and directing him to issue bonds in payment of the same in such sums as the directors of the railroad company may desire, payable one-eighth, respectively, in six, twelve, fifteen, twenty, twenty-three, twenty-five, twenty-seven and twenty-nine years, with interest at the rate of seven per cent., provided said bonds be received at their par value, and to be delivered to said company only on the following conditions :

1st. That all the shops and machinery of said railroad should be located in the said city of Griffin. 2d. That the construction of said road should begin at Griffin, and proceed

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eastward, and that the said mayor and council would issue \$2,000 00 in bonds for every mile graded and made ready for the iron, till said stock was paid for. 3d. That the city of Griffin should be the western terminus of said road. 4th. That said road should be so operated as to give the citizens of Griffin cheap and through freights. 5th. That none of the bonds should be delivered until the council should be satisfied that the road would be built.

The railroad enterprise did not command the confidence of the capitalist of said city, and said company became embarrassed for want of means and on account of a failure to collect subscriptions, and under these unfavorable circumstances, a resolution was offered in council authorizing the issuing of bonds of said city in payment of said subscription, utterly ignoring and disregarding all the conditions upon which said subscription was made by a former council, which passed by a vote of four yeas to three nays. G. A. Cunningham and T. J. Brooks, who were members of said council, voted yea; they were creditors of said road to a large extent and thereby disqualified to vote.

None of the conditions were complied with except that the work was commenced at the city of Griffin, but it was removed to the other end of the road soon after the bonds were delivered to the railroad company.

It was insisted on the part of defendant, 1st, that the amendment of 1859 to the charter was repealed by the provision in the constitution of 1868, recited in the first head-note; 2d. That if such repeal did not take place, then the submission should have been to the citizens, and not to the legal voters; 3d. That a majority of the legal voters did not vote at said election; 4th. That whilst the defendant may have had the power to subscribe to such stock, it had no authority to issue negotiable securities in payment therefor; 5th. That said bonds were delivered to the railroad company before the various conditions upon which the subscription to the stock was made, were complied with; 6th. That James S. Boynton was acting, at the time the subscription to the stock was made

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and the bonds were issued, in the dual capacity of president of the railroad company and as mayor of the city.

No notice to the plaintiffs of any of the above alleged defects in the bonds was traced.

All of the aforesaid defenses were overruled and the defendant excepted.

Fifty bonds were issued on February 20th, 1872. On March 20th thereafter, the following resolution was passed by the mayor and council:

"WHEREAS, The interest of Griffin and her railroads are identical; and whereas the officers of the Griffin, Monticello and Madison Railroad are now negotiating for the speedy construction of said road; and whereas the city of Griffin intends in good faith and promptness to discharge all her obligations: Therefore, for the purpose of rendering to the officers of said road all the assistance that indemnity can afford in their negotiations:

"Resolved, That the mayor and treasurer be and they are hereby authorized and required to issue at once to the Griffin, Monticello and Madison Railroad Company, the balance of the bonds of said city to pay in full the \$40,000 00 subscription made to said road, and that the following indorsement be printed upon the back of said bonds:

"Resolved, That in case of default of payment of any of the coupons of the within bond at the time of their maturity, then the bond itself to become due and payable, and it is hereby made a part of the contract in the issue of said bonds."

On April, 23d, following, it was resolved "that the foregoing resolution (last of the above) has reference to, and applies to, all the bonds issued to the Griffin, Monticello and Madison Railroad Company, and none other."

The provision incorporated in the above resolutions in reference to expediting the time of payment in case of default in meeting an installment of interest, was indorsed on the twenty-five bonds first issued, after their delivery to the company; on the remaining fifteen bonds, before. It was insisted by the defendant that such indorsement on the bonds first aforesaid, was void for want of consideration.

The evidence showed that the bonds were delivered by the defendant to J. H. Johnson, as the secretary and treasurer of the railroad company; that he transferred them to plaintiffs, who resides in New York, as his property, as collateral secu-

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rity for money advanced to him; that the advance of money was made under a contract entered into at New York, and to be there performed; that he was to pay from twelve to thirteen per cent. per annum on the money thus advanced; that Johnson understood fully the circumstances under which the bonds were issued, as he was an active agent in procuring the subscription to the stock; that he was engaged in the banking business in the city of Griffin.

Before the commencement of the suit of plaintiffs, a bill had been filed by Keith and other tax-payers of the city of Griffin, against said mayor and council of the city of Griffin and the various holders of said bonds, to cancel the same upon substantially the same grounds as those upon which the above defense is based. After the commencement of such suit, the complainants filed an amendment, in which they stated the action of plaintiffs, prayed that further proceedings in that case might be enjoined, and that the entire controversy might be settled by the trial upon the bill. At the February term of the court, 1875, it was agreed between counsel that said equity cause, and other equity cases enjoined by it, should be continued and set down for trial on the first day of the August term, 1875. When the day agreed upon between counsel for the trial arrived, the court, over the objection of Keith *et al.*, called the common law case. An agreement was entered into to try the equity cause with it. The two cases were accordingly submitted together. The court ruled that the plaintiffs in the common law cause were entitled to the opening and conclusion of the argument. To this ruling Keith *et al.* excepted.

None of the bonds sued on were due, unless made so under the terms of the indorsement, on account of default in meeting the interest.

The jury found for Inman, Swann & Company the interest due on their bonds up to the time of the commencement of the suit. They found, in the equity cause, the bonds to be valid.

Keith *et al.* and the mayor and council of the city of Griffin

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moved for a new trial upon the following, among other grounds, to-wit:

1st. Because the court erred in overruling the first six defenses to the common law action, as heretofore specified.

2d. Because the court erred in charging as follows: "If, therefore, the city had the authority to issue the bonds, then the fact that some of the city officials were officers of the railroad, does not, of itself, invalidate the bonds in the hands of anybody."

3d. Because the court erred in excluding testimony to show that the road was not in the condition required by the contract of subscription at the time the bonds were issued, on counsels' stating their inability to trace notice to plaintiffs.

4th. Because the verdict finding the bonds valid is contrary to the law and the evidence.

5th. Because the court erred in taking up the case of Inman, Swann & Company *vs.* the mayor and council, prior to the equity case of Keith *et al.* *vs.* said mayor and council *et al.*, as agreed upon by counsel in the latter case.

6th. Because the court erred in allowing to counsel for Inman, Swann & Company, the opening and conclusion of the argument of the two cases jointly submitted to the jury.

The motion was overruled, and Keith *et al.*, and the mayor and council of the city of Griffin, excepted.

SPEER & STEWART; HUNT & JOHNSON; D. N. MARTIN, for plaintiffs in error.

BECK & BEEKS; BOYNTON & DISMUKE, for defendants.

BLECKLEY, Judge.

The city charter provided for subscription by the mayor and council, "on the recommendation of a majority of citizens, either in public meeting or by public election." As election is designated as one of the modes of making the recommendation, the citizens contemplated in the charter are probably those qualified to vote. The general source of au-

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thority for such subscriptions, which the constitution ordains, is "a majority of the qualified voters of such town or city, voting at an election held for the purpose?" Leaving out the question whether the action of any number of citizens "in public meeting" could be recognized, we think the charter and the constitution are near enough alike, in their provisions touching elections, for the former not to be wholly repealed by the latter. We are not sure that a repeal would be wrought if they were more unlike than they are, as the constitution, in the provision from which we have quoted, seems to intend a limitation upon future legislation, and not the abrogation of prior enactments. If the charter, in the use of the loose term "citizens," be construed to mean all the citizens, whether qualified to vote or not, and if the constitution be retroactive and in conflict with it, the result would be, not a repeal, but a modification of the charter. The terms, "a majority of citizens," as found in the charter, would thus be cut down and restricted to "a majority of the qualified voters, * * voting at an election held for the purpose." Looking to the provisions of both instruments, construing them together, and applying the spirit of the constitution, we think the proper mode of administering the charter, at an election held in 1871, was to give all the qualified voters, and none others, an opportunity to vote. This was done. It appears that a majority of those entitled to vote did not take part in the election; but this, we think, made no difference. The general rule as to popular elections is, that those who abstain from exercising the franchise are not regarded in declaring the result. By staying away from the polls, they virtually agree to abide by the will of a majority of those who attend and vote. This is the rule expressly established by the constitution for the class of elections which we are now considering: Only "a majority of the qualified voters * * voting," is required to authorize subscription: See 52 *Georgia Reports*, 621.

For other points ruled in the case, read the syllabus together with the reporter's statement.

Judgment affirmed.

Hayden vs. Anderson et al.

JULIUS A. HAYDEN, plaintiff in error, vs. JAMES C. ANDERSON et al., defendants in error.

1. A stay-bond binds the property of the security from the date of its execution.
2. Where the claimant purchased property from one of the securities, after the execution of the stay-bond, through his agents, who were co-securities with the vendor, he was affected with notice of the lien on such property arising from the making of said bond.
3. The holder of the legal title must claim; therefore, the transferee of a bond for titles, all the purchase money not having been paid for the property covered thereby, cannot protect his interest by claim.
4. Where the verdict in an equity cause found for complainants a specific sum of money, a decree by the chancellor, simply adopting and approving the verdict of the jury, though informal, was not illegal.

Stay-bonds. Lien. Principal and agent. Notice. Claim. Decree. Before Judge BARTLETT. Morgan Superior Court. March Term, 1876.

The following, taken in connection with the decision, sufficiently reports this case:

A part of the realty levied on was claimed under the following chain of title: 1st. A deed from E. W. Thrasher to J. J. Thrasher, dated November 27th, 1874. 2d. A bond for title from J. J. Thrasher to W. L. Thrasher, dated December 7th, 1874. 3d. An assignment of this bond by W. L. Thrasher to J. A. Hayden, dated June 2d, 1875.

COLLIER & COLLIER; E. N. BROYLES; THRASHER & THRASHER, for plaintiff in error.

REESE & REESE, for defendants.

WARNER, Chief Justice.

This was a claim case, on the trial of which the jury found the property subject to the execution levied thereon. The claimant made a motion for a new trial on the various grounds therein set forth, which was overruled by the court, and the claimant excepted.

Hayden *vs.* Anderson *et al.*

Two of the main grounds of error insisted on here were, that the court erred in not ruling out as evidence the plaintiffs' *fit. fa.*, and the decree on which it issued, on the ground that no valid decree had been entered up in the case, and also that the court erred in holding that the bond signed by W. L. Thrasher, as security on the stay of execution, was, in law, a good statutory stay-bond, and created a lien on his property from the date of the execution thereof. It appears from the evidence in the record that the jury, on the trial of the equity cause, found and decreed in favor of the complainants against the defendant a certain specified sum of money, which was fully and specially set forth in the verdict.

The chancellor made and signed the following on the 12th of May, 1875: "Upon hearing and considering the foregoing verdict and decree of the jury, it is adjudged and decreed that the same is hereby adopted and approved, and is now signed by me." The bond for the stay of execution entered on the minutes of the court, and signed by the respective parties named therein, was as follows, to-wit: "James C. Anderson *et al.* vs. Early W. Thrasher, executor of Barton Thrasher, deceased. Verdict and decree for the complainants for \$10,000 00, principal and costs, against E. W. Thrasher, individually. The defendant in the above stated case comes forward and demands a stay of execution according to the statute in such cases made and provided, and brings Albert M. Thrasher, Wilson L. Thrasher, and the firm of Thrasher & Thrasher, composed of Barton H. Thrasher and Albert M. Thrasher, and tenders them as his securities; and they, the said Early W. Thrasher, Albert M. Thrasher, Wilson L. Thrasher, and Thrasher & Thrasher, acknowledge themselves jointly and severally bound unto James C. Anderson *et al.*, complainants in the above stated case, for the payment of the said verdict, and decree, and costs, in said cause. In testimony whereof, the said Early W. Thrasher, Albert M. Thrasher, Wilson L. Thrasher, and Thrasher & Thrasher, have hereunto set their hands and affixed their seals, this 12th

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of May, 1875. Approved : E. Heyser, clerk." The claimant claims title to the property levied on under deeds conveying the same to him by the defendants, and an assignment of a bond for titles to a portion of the property, all executed on the 2d day of June, 1875, and one of the questions is, whether the property of W. L. Thrasher, one of the securities on the stay of execution, was bound for the payment of the judgment in the case in which the execution was stayed, from the date of the stay-bond signed by him ?

1. By the judiciary act of 1799, the property of the defendant was bound from the signing of the judgment, but the defendant against whom such judgment was entered might, within four days from the adjournment of the court, enter good and sufficient security, either in open court or in the clerk's office, for the payment of said judgment and costs, within sixty days, and if such party shall not pay the same agreeable thereto, execution may issue against such party and the security, without any other proceeding thereon. Such has been the law of this state from 1799 up to the present time : See Code, sections 3661, 3662. The uniform construction which has been given to this statute, so far as is known or believed, from the time of its enactment in 1799 up to this day, has been that the property of the security on the stay of execution was bound for the payment of the judgment from the date of the stay-bond signed by him. But it is said that the statute does not declare that the stay-bond shall constitute a lien on the property of the security. The act of 1799, however, declares that the property of the defendant in the judgment shall be bound from the signing thereof, and that execution may issue against him and the security, without any other proceeding thereon. If it was not intended that the property of the security on the stay of execution should be bound for the payment of the judgment in the same manner as the property of the defendant therein, why declare that execution might issue against the defendant in the judgment and the security, without any other proceeding thereon ? An execution is the remedy provided by law to enforce the sale of property bound for its

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payment, either by the terms of some statutory enactment or otherwise. The property of the security on the stay of execution in this state, is bound for the payment of the judgment, by force of the statute, and that is the fair and legitimate interpretation thereof, when it declares that the execution shall issue against the defendant in the judgment and the security without any *other proceeding thereon*. Why authorize the execution to issue against the security without any other proceeding thereon, if it had not been intended that his property should be bound for the payment of the judgment as well as that of the defendant therein? If the property of the security on the stay of execution was not intended to be bound for the payment of the judgment, from the time of his signing his name to the stay-bond or recognizance in the clerk's office, there would seem to be no good reason for an execution to issue against him as well as the principal defendant to collect the amount due on that judgment. Besides, if the property of the security on the stay of execution, is not bound for the payment of the judgment from the date of the stay, the plaintiff, who has been delayed in the collection of his judgment for sixty days, derives no benefit from the security, during the time of the delay, and has no additional property bound for its payment during that time. The statute clearly contemplates that the property of the security shall be bound for the payment of the plaintiff's judgment, in authorizing an execution to issue against him therefor, by some "proceeding." What is that proceeding? Evidently that good and sufficient security shall be entered either in open court, or in the clerk's office, within four days, for the payment of the judgment and costs within sixty days. The act of 1799 did not require that a bond should be given, as the Code now does, but that good and sufficient security must be entered for the payment of the judgment and costs; that is the "proceeding" which binds the property of the security to pay the judgment according to the statute, and when that proceeding is had, the property of the security is bound for the payment of the plaintiff's judgment just as it then stands, from the date of that proceeding, be-

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cause the execution is authorized by the statute to be issued against the security without any "other proceeding thereon." The execution must necessarily relate back to that proceeding of entering the security in the clerk's office for the payment of the judgment, for its foundation and legal support, for the simple reason that it has no other, and if *that* proceeding does not bind the property of the security on the stay-bond so as to authorize the plaintiff to have execution against him, then there is no legal authority for the plaintiff in the judgment to have execution against the security on the stay thereof after the expiration of the sixty days. It is that proceeding in the clerk's office, before referred to, and that alone, which binds the property of the security and authorizes the plaintiff in the judgment to seize and sell the same under an execution against him in satisfaction of that judgment. If that proceeding in the clerk's office, as declared by the statute, does not bind the property of the security for the payment of the plaintiff's judgment, then it is not bound at all, and there is no legal authority for issuing an execution against the property of the security to satisfy the plaintiff's judgment, but the statute recognizes that proceeding as binding the property of the security, when it declares that execution may issue against the defendant in the judgment and the security, "without any other proceeding thereon." The statute does not declare that the property of the security shall be bound for the payment of the judgment from the time of issuing, or of levying the execution, and the only logical conclusion is, that the property of the security is bound for the payment of the judgment from the time of signing the bond, without any other proceeding for that purpose. Such it is believed has been the contemporaneous construction of the act of 1799, and that the bench and bar, and people of the state, have acquiesced in that construction up to the present time.

2. But be that as it may, the deeds under which the claimant claims title to the property levied on, were executed by the defendant to him, through his agents, A. M. & B. H. Thrasher, (the claimant not being present) who were both

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securities on the stay-bond, and as a matter of course had full knowledge of its existence, and who were the parties to it, as well as of the existence of the judgment on which the execution was stayed. Notice to the claimant's agents, through whom the property was purchased from the defendants, was notice to him of the above recited facts, inasmuch as they must necessarily have had notice of them at the time of the alleged trade and conveyance of the property: Code, section 2200. In point of fact, it would seem from the evidence in the record, that the claimant had but little to do in negotiating the trade for the property, and taking the conveyances therefor; that part of the business appears to have been managed entirely by Thrasher & Thrasher, who acted as his agents, and who were two of the securities on the stay-bond, and who must have known at that time, as his agents, all about the condition of the property, and of the incumbrances that were upon it, and must have remembered it at the time.

3. As to the property levied on as the property of Early W. Thrasher, the principal defendant in the judgment, and conveyed by him to J. J. Thrasher, and who executed a bond for titles therefor to W. L. Thrasher, who assigned said bond for titles to Hayden, the claimant, it appears that all the purchase money had not been paid for the property at the time of the assignment of the bond to the claimant on the 2d of June, 1875. If the conveyance of the property by Early W. Thrasher to J. J. Thrasher, was a fair and *bona fide* transaction, and not intended to hinder and delay the collection of the plaintiffs' demand against him, then the title to that property is in J. J. Thrasher, and not in the claimant, who had no legal right or authority, so far as the record shows, to claim J. J. Thrasher's property for him. The evidence in the record is, that the defendant, E. W. Thrasher, continued in possession of the property until after the date of the judgment against him, and up to a short time before the levy was made thereon by the sheriff.

4. The decree which the chancellor signed was not as formal as it might have been, or good pleading may have re-

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quired, but it was a substantial compliance with the Code, referring to the verdict, and adopting it as the decree of the court, it was sufficiently certain, for all legal and practical purposes.

In view of the evidence contained in the record, and the law applicable thereto, there was no error in the judgment of the court in overruling the claimant's motion for a new trial.

Let the judgment of the court below be affirmed.

**THE PEOPLE'S BANK OF NEWNAN, plaintiff in error, *vs.*
ORLANDO MCLENDON, defendant in error.**

A commissioner entrusted by a party to a suit to find another commissioner and execute interrogatories, may recover therefor whatever his services are reasonably worth, though he was named by the other party as his commissioner on the interrogatories, before thus entrusted by the first party with the duty to hunt up another commissioner and take the business in charge.

Certiorari. Interrogatories. Before Judge BUCHANAN.
Coweta County. At Chambers. December 13th, 1875.

Reported in the opinion.

A. D. FREEMAN, for plaintiff in error.

P. H. BREWSTER; SPEER & SPEER, for defendant.

JACKSON, Judge.

The People's Bank of Newnan and another were at law. The bank sued out a commission to take the interrogatories of a witness. The other party named McLendon, the defendant in error here, as commissioner, or one of them. Whereupon the bank entrusted the commission and interrogatories to McLendon, and asked him to get another commissioner and execute the interrogatories. McLendon acted, and charged the bank \$10 00; the bank defended on the ground that it was only bound to pay \$2 00; the court below, on *certiorari*,

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held that plaintiff could recover \$10 00; the bank excepted, and the case is here.

But for the fact that a principle of some consequence to the profession and to litigants was involved in this case, the principle that "*de minimis non curat lex*" would apply to the case. The idea of a bank defending a claim for a \$10 00 fee due a lawyer, who proved his services to be worth that sum, is rather too close, but perhaps the principle at stake may justify it.

The question is, can a commissioner recover more than \$2 00 for his services? Before the act of 1866—Code, section 3883—he could not; but that act declares that reasonable compensation may be paid to the commissioners, but not more than \$2 00 a day shall be taxed as costs against the party cast in the suit. We see no reason, therefore, why a commissioner may not recover any reasonable compensation agreed upon, and if none be agreed upon, why he may not recover from the party at whose instance and request he may act, on a *quantum meruit*, whatever his services were worth. At least I think so. Such seems to me to be the remedy that this act of 1866 applied to the defect in the old law. So that if McLendon was employed by the bank, he could recover from it what his services were worth. Was he employed? We all think that he was not only to execute the interrogatories, to do his part of that duty, but to hunt up another commissioner and take the *onus* of the whole business upon himself. We all think that he was thus entitled to recover from the bank, which thus, through its attorney, entrusted this business to McLendon, the \$10 00 sued for; whilst I think any commissioner employed by a party to execute interrogatories may not only recover an agreed sum, in which I understand the whole court to concur, but if no agreement be made, that he may recover whatever sum he proves his services to have been worth.

The only limitation upon an agreed fee seems to be that it shall not be taxed in the bill of costs against the losing party.

Judgment affirmed.

White *vs.* Reviere.

**JAMES F. WHITE, plaintiff in error, *vs.* FRANCIS REVIERE,
administrator, defendant in error.**

1. An administrator who sold and conveyed land prior to the adoption of the Code, was entitled to the same equitable lien for the purchase money as other vendors.
2. Exceptions to an auditor's report need not set forth any of the evidence; more especially, where the auditor himself has reported all the evidence and thus made it part of the record.
3. The burden of showing error in the report is on the excepting party; and, upon exceptions of fact, when he fails, for any cause, to convince the court, he is entitled to trial by jury, with the report as *prima facie* evidence against him.
4. An exception of fact is sufficiently specific when it points out the particular sum which the auditor should have allowed as a credit for "insolvent notes and accounts" instead of the sum which he did allow. So, too, is an exception which complains that a certain amount should have been debited for "county scrip," and a certain other amount for "notes not appraised." So, too, is an exception which complains that the "value of the estate" was charged at a given sum, when it should have been charged at a certain other sum. So, too, is an exception which complains that certain notes should have been credited to the objecting party before certain other notes.
5. An exception is too general and indefinite which merely alleges error because "the proof shows that defendant is not indebted to the complainant but that complainant is indebted to the defendant."
6. The auditor or master has no power to decide on a demurrer to the bill.

Administrators and executors. Vendor and purchaser. Lien. Auditor. Practice in the Superior Court. Before Judge WRIGHT. Upson Superior Court. November adjourned Term, 1875.

Francis Reviere, as administrator of Thomas W. Reviere, deceased, filed his bill against James F. White, to enforce the vendor's lien as against certain land sold to defendant on or about the 2d of October, 1860. Three notes were given for / the purchase money, two for \$1,200 00 each, due respectively on December 25th, 1861, and December 25th, 1862, and one for \$1,210 00, due December 25th, 1863.

The defendant demurred to the bill upon the ground that an administrator selling land was not entitled to a vendor's

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lien. He also answered, setting up that at the time of the aforesaid purchase, it was agreed that the aforesaid notes should be taken up by him when due as a part of his distributive share, in right of his wife, in the estate of the intestate. He also alleged, by way of cross-bill, that complainant, upon a fair settlement, would be found indebted to him, in right of his wife, in a large sum, for which he prayed a decree, etc.

To this cross-bill complainant filed his answer, setting forth, in full, his actings and doings as administrator.

The case was referred to an auditor with the powers of a master in chancery, who reported, in substance, as follows :

On January 1st, 1863, complainant was indebted to defendant .	\$4,967 50
Credits of that date. Amount paid White in negroes .	\$3,735 00
" " White's note to Hightower paid	185 00
" " White's note to Florence paid .	89 38
" " White's note to Adams paid ..	50 00
" " One-fifth of attorney's fees, etc..	78 12
	<hr/>
	\$4,137 50
Amount due defendant to balance	830 00—\$4,967 50

On January 1st, 1863, defendant was indebted to complainant \$3,610 00 principal, and \$252 00 interest, on the three notes given for the purchase of land above set forth. Deducting from these sums the aforesaid \$830 00, leaves due to complainant, on the date aforesaid, \$3,032 00. Recommends that decree be passed, in accordance with report, making the aforesaid land subject thereto, and directing that the same be sold.

Overrules the demurrer.

The report showed in detail the calculations by which the results above indicated were reached. Accompanying it, and made a part thereof, was the evidence introduced before the auditor, deemed immaterial here.

The defendant excepted to the report upon the following grounds, to-wit :

1st. Because the auditor overruled the demurrer to complainant's bill ; and because he refused to dismiss the same, it appearing from the charges therein contained, and from the

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testimony accompanying the auditor's report, that complainant did not have a vendor's lien on the land purchased by defendant.

2d. Because said auditor allowed to complainant the following credit, to-wit: For insolvent notes and accounts \$2,106 05, when there should have been allowed only \$849 48, being an error against complainant of one-fifth of the difference between the two items, with interest. He failed to charge the complainant with \$128 75 for county scrip, with interest from November 7th, 1860, and \$353 81 for notes not appraised, with interest, to one-fifth of which amounts defendant was entitled.

3d. Because said auditor only charged the value of the estate which went into complainant's hands at the principal sum of \$23,459 27, with interest amounting to \$1,378 29, making a total charge of \$24,837 53, when he should have debited said complainant with the principal sum of \$33,862 62, less insolvent debts, amounting to \$2,106 05, leaving balance of \$31,756 57, making a difference against defendant of one-fifth of \$8,297 10, with interest.

4th. Because said creditor first charged defendant with \$3,735 00 for the purchase of negroes from said estate and credited said item to complainant, when the notes in controversy should have been first charged to defendant as a portion of his distributive share, said notes having been given to complainant simply as vouchers.

5th. Because the finding of the auditor was erroneous, as the proof shows that defendant is not indebted to complainant, but that the latter is indebted to him.

6th. Because the auditor decided illegally in finding in favor of the vendor's lien.

In support of the 2d, 3d, 4th and 5th exceptions, the defendant refers to the evidence accompanying the auditor's report and made a part of the same. In support of all of the exceptions defendant refers to the admissions made in the pleadings of complainant.

The complainant demurred to the exceptions. The demur-

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rer was sustained to the first five as not being sufficiently specific, and because the evidence in support thereof was not sufficiently set forth in said exceptions. It was further ordered that the sixth exception be overruled, that the report of the auditor be approved, and that complainant have leave to proceed to the jury with said report, and with such other legal proofs as may be desired.

To this ruling defendant excepted.

The demurrer to the bill originally filed was then heard and overruled, and defendant excepted.

A verdict was taken in accordance with said report and a decree rendered.

Error is assigned upon each of the aforesaid grounds of exception.

J. A. COTTEN, for plaintiff in error.

SPEER & STEWART; E. W. BECK; C. PEEPLES; E. N. BROYLES, for defendant.

BLECKLEY, Judge.

In this state, when an administrator sells land upon credit, he may or may not take security for the purchase money. Failing to take security, he acts at his peril; but this ought not to put him in a worse condition than other vendors. His equity against the purchaser is as strong as theirs. With the purchase money unpaid, the purchaser from an administrator has no better right to hold the land exempt from the claim for such money, than has any other purchaser. We do not see that the administrator's equity is the least weakened by the fact that he has title to land only for the purpose of administration, and that the beneficial interest, as well as the general legal title, is in the distributees. Whether we regard the protection of the administrator, or the protection of those for whose ultimate benefit he acts, there is equal reason for holding the land subject to pay for itself as against the purchaser. The principle of equitable lien is in the transaction.

McCain *vs.* The State of Georgia.

The administrator is the vendor. Before selling he has title upon which he could recover in ejectment: Code, sec. 2246; 3 *Kelly*, 105; 14 *Georgia Reports*, 145; 20 *Ibid.*, 135. The Code abolished the vendor's equitable lien; but this provision was not retroactive: 34 *Georgia Reports*, 386. And the conveyance, in the present case, was prior to the Code.

Several points of practice were ruled by the court, all of which appear at sufficient length in the head-notes.

Judgment reversed.

ARMISTEAD McCAIN, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. On an indictment for maintaining and keeping a lewd house, evidence of the general reputation for chastity of the women frequenting and boarding at the house is admissible.
2. Independently of such evidence, the testimony was abundant in this case to sustain the verdict, and the judge was right in refusing to set it aside and grant a new trial.
3. On such a trial, a charge that "the state must prove, to the satisfaction of the jury, that the defendant did keep and maintain a lewd house for the practice of fornication or adultery; that the lewdness must be proven to have been carried on in his house, and with his knowledge and consent, but that it was not necessary to prove that the lewdness was carried on openly and notoriously—if carried on in his house and with his consent privately, that would suffice," is sound, and submits the law fairly to the jury.
4. A fine of \$300 00 and costs, or in default of payment within ten days, work in the chain-gang on the public works for twelve months, in view of the facts proven, is not punishment excessive and not commensurate with the offense charged.

Criminal law. Evidence. New trial. Sentence. Before Judge McCUTCHEN. Whitfield Superior Court. April Term, 1876.

Reported in the opinion.

J. A. GLENN; J. A. R. HANKS; JOHNSON & McCAMY,
by brief, for plaintiff in error.

McCain *vs.* The State of Georgia.

A. T. HACKETT, solicitor general, by Z. D. HARRISON,
for the state.

JACKSON, Judge.

The defendant was indicted for keeping a lewd house, he was found guilty, and sentenced to pay a fine of \$300 00 and all costs, or in default thereof in ten days, to go to hard work in the chain-gang. He moved for a new trial on various grounds ; it was denied him, and he excepted.

1. The first complaint is that evidence of the general character for chastity of the women boarding at his house and frequenting it was admitted. It ought to have been admitted says the law: 2 Bishop's Crim. Proc., sec. 83 ; Wharton's Am. Crim. Law, 2390, and cases cited.

2. Besides, the proof was abundant besides this evidence, and the defendant would have been, and ought to have been, convicted without it.

3. Nor do we think that the court erred in the charge complained of. That charge was to the effect that the lewdness need not be proven to have been openly and notoriously carried on ; that it was enough if it was done with the knowledge and consent of the defendant, though privately. Such things are rarely done in public ; and if such proof were required there would rarely, we suppose, be a conviction.

4. The punishment was not excessive. The facts show a very bad case ; the lewdness approximated as near to open and notorious defiance of decency as well as law, as any case of the kind could well be open and defiant ; and the punishment, especially the fine, is quite moderate.

Judgment affirmed.

Nutting *vs.* Sloan, Groover & Company.

CHARLES A. NUTTING, plaintiff in error, *vs.* SLOAN, GROOVER & COMPANY, defendants in error.

Where the plaintiff's evidence showed that the draft sued on was given by defendants' agent to him for money advanced with which to purchase cotton ; that said agent notified defendants of the draft and the circumstances under which it was given ; that defendants subsequently received the cotton thus purchased, but refused to accept the draft, applying the proceeds of the cotton to a claim in their favor against their said agent :

Held, that a non-suit should not have been awarded.

Negotiable instruments. Notice. Non-suit. Before Judge TOMPKINS. Chatham Superior Court. November Term, 1875.

Reported in the decision.

R. E. LESTER, for plaintiff in error.

HOWELL & DENMARK ; McCAY & TRIPPE, for defendants.

WARNER, Chief Justice.

The plaintiff brought his action against the defendants on the common law side of the court, in the nature of a short bill in equity, in which he set forth the transaction and the facts, (under the law of this state and the practice of our courts,) which would equitably entitle him to recover from the defendants the amount of the following draft, which the defendants refused to accept :

“ MACON, GA., 13th October, 1868.

“ At sight pay to the order of C. A. Nutting \$4,500 00,
value received, which place to the account of cotton shipped.

(Signed) “ J. W. FEARS.

“ To SLOAN, GROOVER & COMPANY, Savannah, Ga.”

The defendants pleaded the general issue, and that the plaintiff had changed the nature of the debt by accepting the note of J. W. Fears in settlement of the draft. On the trial of the case, the plaintiff introduced, in substance, the following evidence :

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1st. The draft and the notarial protest, showing presentation and refusal of defendants to pay, October 15th, 1868, they saying: "We decline to pay it."

2d. J. W. Fears testified as follows: Was dealing in cotton October 13th, 1868, purchasing in Macon, and shipping to the defendants, who were my factors, in Savannah. The history of the draft sued on is as follows: I bought a lot of forty-three bales of cotton on the day of the date of the draft, and the plaintiff advanced the money to pay for it, by discounting the draft which I drew against the cotton. The cotton was shipped to Sloan, Groover & Company, in my name, and the bill of lading was to have been given to the plaintiff to be attached to the draft, but owing to some delay in getting the bill of lading, I did not get it to the plaintiff in time for that day's mail, and I undertook to send it forward to Sloan, Groover & Company, the defendants, with instructions that the draft had been drawn against the cotton, and that the bill of lading was the property of the holder of the draft until the draft was paid. I sent them the bill of lading the same day with letter so notifying them, and also telegraphed them the same thing. They received the instructions in due time, but as I was afterwards informed by them, they did not pay the draft, but, on the contrary, disposed of the cotton, and kept the money under the pretence that I owed them a balance, to which they applied the proceeds of the cotton, although I did not think I owed them anything. No part of the draft has ever been paid, either by defendants or myself, and they have not paid any of the proceeds of the cotton either to me or to the plaintiff.

3d. The letter of J. W. Fears, referred to in his testimony, enclosing the bill of lading—produced under notice to defendants:

"MACON, GA., October 14th, 1868.

"*Messrs. Sloan, Groover & Company, Savannah :*

"Market off to twenty-two cents low middling; twenty-two and a half cents strictly middling. New York market,

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Liverpool one-eighth cent off. Do as you think best with my cotton now. I shipped to-day samples eighteen bales, which with forty-three samples I shipped to-day, but could not get bill of lading in time for mail. C. & H. has sight draft \$6,000 00, and bill of lading thirty-five and the eighteen bales, samples of which I send you, this draft is against.

"C. A. Nutting has sight draft \$4,500 00, and the samples forty-three bales is for that.

"An account of these two drafts \$4,500 00, \$1,500 000—bill of lading came as I was writing—send forty-three to pay Nutting's draft; eighteen and thirty-five—fifty-three to pay C. & H.' draft.

"Please honor and ship direct to New York, if best. Will ship fifty bales to-morrow. J. W. FEARS."

4th. The letter of Fears to Sloan, Groover & Company, further advising about the draft, produced by defendants under notice to produce:

"MACON, GA., October 15th, 1868.

"*Messrs. Sloan, Groover & Co., Savannah, Ga.:*

"Your letters and your dispatches of to-day received. They have annoyed me very much. I drew the \$4,500 00, favor of C. A. Nutting, against the forty-three bales cotton, in accordance with your instructions to draw with bill of lading attached. As it was late before getting the bill of lading, I informed Messrs. Goodall and Nutting that I had expressed you the bill and samples for forty-three bales, and notified you it was against that lot that the \$4,500 00 was drawn, virtually placing the bill of lading to Nutting's draft, and so advised, I telegraphed you to pay the draft certain, \$4,500 00. Ship cotton to New York. I sincerely hope you did pay it, as Nutting trusted me with the bill of lading to mail for him, and so advised him. If you did not pay Nutting's draft, you have seriously damaged me. You say I have overdrawn. You must be mistaken in this.

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Do please, if the Nutting paper is not paid to-day, pay it in the morning, and telegraph me by nine o'clock that it is paid. Cotton is dull here, twenty-two and a half cents, middling. Now is the time to buy.

* * * * *

(Signed)

"J. W. FEARS."

The following two letters, dated 13th and 16th October, 1868, were attached to the cross-interrogatories propounded to Fears, witness for plaintiff:

5th. "MACON, GA., October 13th, 1868.

"*Messrs. Sloan, Groover & Co., Savannah, Ga.:*

"Your letter requiring bills of lading, and seeming to complain of my not attaching to bills, came to hand. I try to do business correctly and honestly, etc. I telegraphed you "not to send money if account was unsatisfactory. Would close. Write." I confirm it. My account I regard as safe, etc. Now, if you are not satisfied with account I will square up and change. Same time I say your business is satisfactory, but you must not complain so much. I ship you thirty-five samples to-night. There are fifty-one bales in this lot, and will ship forty bales to-morrow with bill of lading attached.

(Signed)

J. W. FEARS."

6th. "MACON, GA., October 16th, 1868.

"*Messrs. Sloan, Groover & Co., Savannah, Ga.:*

"I think you will discover an error in your cotton returns and bacon entries. As I have ordered cotton all sold

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You not accepting Nutting's bill will give me no trouble. I arranged it immediately with Nutting, etc.

* * * * * * * * *

"Yours, truly, (Signed) J. W. FEARS."

7th. C. A. Nutting: Am the plaintiff. The draft belongs to me, and was originally made to me by Fears, on forty-three bales of cotton, for money advanced by me to buy said cotton. Draft drawn on Sloan, Groover & Company, who

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were to be consignees of the cotton. The draft was expressly agreed to be a lien on the cotton for its payment, as expressed in the draft. I paid Fears \$4,500 00 for the draft, less one-fourth per cent. discount, and took as security the lien which the draft expressed, on the cotton, the money to purchase which I had advanced to Fears. Have never received a cent for it either from defendants or Fears. The bill of lading or railroad receipt for the said cotton was to have been handed to me the same day the draft was drawn, to be attached to it. But Fears said he could not get the cotton shipped and obtain the receipt or bill of lading for it before the closing of the Savannah mail for that day, and he promised that he would send it down by the express or express messenger of that night, to be handed to defendants the next morning, with instructions that the bill of lading belonged to the draft and was security for its payment. That is the reason why the bill of lading was not attached to the draft. Defendants got the bill of lading and the cotton, and refused to pay the draft, and have never paid it or applied any of the proceeds of the cotton to it, although I have demanded it of them time and again. My claim has never been settled or arranged for in any way by either Fears or Sloan, Groover & Company.

8th. W. P. Goodall: The testimony substantially the same as Nutting's.

9th. John T. Ronan, sworn: Was freight agent of Central Railroad at Savannah. Proves the receipt of the forty-three bales cotton and delivery to defendants at Savannah.

10th. Alexander J. Raymar: Proves average weight of upland cotton to be about five hundred pounds per bale in October, 1868.

11th. H. M. Comer: Proves price of cotton at time of receipt by defendants twenty-three and a half cents per pound, with rising tendency.

12th. R. N. Reed: Proves price by actual sales made by him twenty-four cents per pound.

After the plaintiff had closed his testimony, the defendants

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demurred to the same and made a motion for a non-suit, which was granted by the court and the plaintiff excepted.

The sole question, therefore, is whether under any view which the jury could have taken of the evidence before them, they would have been authorized to have found a verdict for the plaintiff. The general rule, undoubtedly, is that where one person has goods in the possession of another, he cannot, by drawing a bill on that person, render the drawee liable to the payee for not accepting the draft, for the simple reason that there would be no privity of contract between the payee of the draft and the drawee thereof, but that is not the case made by the evidence in the record before us; there is something more here which might have authorized the jury to have found for the plaintiff, on the ground that the defendants received the cotton consigned to them after notice that the draft had been drawn on them in favor of the plaintiff for the price of the cotton so consigned to them. If the defendants received the cotton consigned to them, after notice from the consignor that he had drawn a draft against it in favor of the plaintiff for the money advanced by him to pay for it, and then refused to accept the draft, and applied the proceeds of the cotton to the payment of their own account for advances made to Fears, the drawer, then the plaintiff had a *prima facie* case which would have entitled him to recover, and the questions of fact involved should have been submitted to the jury. The true principles of law applicable to the facts of this case, are correctly stated by Parsons in his treatise on the law of promissory notes and bills of exchange: "It would seem, says the learned author, that if a person should write to a factor that he had sent him certain goods for sale, and drawn a bill on him on the credit of the goods to a certain amount, the factor, if he received the consignment, would be bound to accept the bill. The question still remains, whether the payee of the bill would have a right of action against the factor as an acceptor for money had and received to his use, on the ground that the acceptance of the consignment was equivalent to a promise to accept. We should hold him so

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liable, on the ground that by accepting the consignment he had made a contract with the drawer to accept the bill, and that this contract being for the benefit of a third person, this person might bring an action for the breach of the contract?" 1 Parsons on Notes and Bills, 291. In view of the fact that under our practice, the plaintiff's declaration was so framed as to authorize the equitable as well as the legal rights of the parties to have been considered on the trial of the case, the court erred, in our judgment, in non-suiting the plaintiff on the statement of facts contained in the record.

Let the judgment of the court below be reversed.

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THE DALTON CITY COMPANY, plaintiff in error, *vs.* J. A. W. JOHNSON, defendant in error.

1. Where the note sued upon contains no negotiable words, and is not indorsed or assigned by the payee, and the payee is not a party before the court, the title is involved as a part of the plaintiff's or complainant's case, no matter whether the defendant has a defense or not.
2. Section 2789 of the Code treats of notes in the hands of holders who are apparently regular holders according to the words of the instrument or some indorsement or assignment thereof, and does not signify that a stranger to a contract which is not payable to bearer, and not indorsed or assigned, may enforce it in his own name by reason of mere possession of the writing.
3. Where the complainant seeks to collect a note not negotiable, and not indorsed or assigned, and which has been paid or partly paid by the maker to the payee, and where the right to collect, notwithstanding such payment, is claimed to arise out of a special contract for a valuable consideration, the effect of which is to estop the maker from setting up payment as against the complainant, such special contract, to be available, must be alleged in the bill and proved as alleged.
4. The doctrine of estoppel by admissions is not applicable to the facts of this case.

Negotiable instruments. Title. Pleadings. Estoppel.
Before Judge McCUTCHEON. Whitfield Superior Court. November Term, 1875.

The Dalton City Company vs. Johnson.

The Dalton City Company filed its bill against J. A. W. Johnson, making, in brief, this case :

On or about August 18th, 1859, complainant, by a deed of trust entered into between it of the first part, certain trustees of the second part, and the Dalton and Gadsden Railroad Company of the third part, conveyed to said trustees certain lands in the city of Dalton, to create a fund to aid in the construction of the railroad from Dalton to Jacksonville, Alabama. On or about May 21st, 1860, said trustees sold a portion of said land to defendant, taking two notes therefor, each for \$200 00, payable in five and eleven months, respectively, to the order of the Dalton and Gadsden Railroad Company. These notes should have been made payable to the order of the Trustees of the Dalton City Company's Real Estate Trust Fund, but by mistake or oversight were made payable as aforesaid. The name of said railroad company was subsequently changed to that of the Dalton and Jacksonville Railroad Company. By an agreement made between said railroad company and complainant, on July 20th, 1866, and by a deed from the trustees of said real estate trust fund, of date November 9th, 1866, said trust was terminated, and said lands, excepting such parts as had been sold, were reconveyed to complainant, and the two notes aforesaid were delivered by the railroad company to the complainant, to be collected for the use of the latter. These notes, with the interest thereon, are still due and unpaid, and should constitute a lien on the lots for which they were given. Complainant, therefore, prays as follows: 1st. That it may have judgment against said defendant for the amount of said notes, with interest. 2d. That it may have its lien on said lots for the amount of said purchase money, with interest. 3d. That it may have general relief and the process of subpoena.

The defendant, in his answer, states that he agreed to pay for said lots \$800 00, one-half cash and the balance on time; that the two notes, as set forth in the bill, represent the time payment. Denies most emphatically the mistake or oversight alleged to have been made in the payee of the notes.

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Denies that the notes are unpaid, and asserts that before the first became due, he, at the instance of the officers of the railroad company, paid off a note given by said company to George Wadsworth, or bearer, for \$491 83, with a credit thereon of \$153 00, and under an agreement that he was to be credited with the amount advanced by him on his notes. He alleges that complainant is indebted to respondent for professional services as an attorney, in the sum of \$265 50, besides interest, for which he prays judgment.

The evidence, so far as material, will be found stated in the opinion.

The jury found for the complainant \$137 54. The defendant moved for a new trial upon the following, among other grounds:

1st. Because the court erred in charging the jury as follows: "The title of the holder of a note cannot be inquired into unless it is necessary to the protection of the defendant, or to let in the defense which he seeks to make."

2d. Because the verdict is contrary to the following portion of the charge: "Complainant insists that the defendant, by his conduct, is estopped from proving that the notes were paid; that the conduct and admissions of the defendant misled it to its injury. If you find this to be the fact, under the law the court will give you, then you should find for complainant so far as the issue of payment is concerned. Before this estoppel can be set up, you must find that the conduct and admissions of the defendant have misled complainant, and that it has thereby been injured. Complainant must have acted on the conduct and admissions of defendant in some way, by which it has been injured, and unless it appears to you, from the evidence, that it is so injured, defendant would not be estopped from proving the payment of the notes sued on. Admissions upon which other parties have acted, either to their own injury, or to the benefit of the person making the admissions, and which admissions were acted upon, constitute an estoppel."

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3d. Because the court erred in its charge as set forth in the preceding ground.

The motion was overruled and the defendant excepted.

W. K. MOORE; JOHNSON & McCAMY, for plaintiff in error.

D. A. WALKER, by brief, for defendant.

BLECKLEY, Judge.

1, 2. Though the case be in equity, the complainant, as a general rule, must have title, or the person in whom the title is vested must be a party : 2 *Leading Cases in Equity*, Part 2, page 242 ; 2 *Kelly*, 424 ; 3 *Ibid.*, 161 ; 1 *Ibid.*, 236 ; 10 *Georgia Reports*, 329. Under the Code, all *chooses* in action arising upon contract are assignable : Code, section 2244. Are the notes set forth in this bill available to the Dalton City Company, in an action brought in its own name, against the debtor ? The answer to this question depends, first, upon whether the notes are payable to that company ; second, whether, if they are not, they contain words rendering them negotiable without being indorsed or assigned ; and, third, whether, supposing it to be necessary, any indorsement or assignment appears. On their face, the note are payable, not to the Dalton City Company, but to the Dalton and Gadsden Railroad Company. As we understand the record, they came into existence thus : The city company conveyed land to certain trustees, in trust for the railroad company. For a part of this land, sold by the trustees, the notes were given. The bill alleges that they were made payable to the railroad company by mistake, the intention having been to make them payable to the trustees ; but the allegation is unsupported by any evidence, and is directly contradicted by the answer. Suppose, however, that the allegation were proved, it would not put title, either legal or equitable, into the city company, the complainant. The trust, we may infer, in the absence of anything showing to the contrary, was not for the benefit of

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that company, but for the benefit of the railroad company. So that if the notes had been made payable to the trustees, the complainant would still have been a stranger to them. The notes contain no negotiable words, and they are not indorsed. Neither does any assignment of them appear, unless it can be collected from one or both of two certain writings set out in the evidence, embracing terms of settlement, or partial settlement, between the two companies. The first of these writings provided, expressly, that the complainant was to have railroad stock for all the lands which had been sold. These notes then existed, and the land for which they were given had, of course, then been sold. There is no intimation that there was any purpose to pay the complainant twice for this particular portion of the land, once in railroad stock and again in the notes covering the price. But the stipulation to pay in railroad stock is unmistakable. It follows, we think, that the writing containing that stipulation cannot be construed as an assignment of these notes. Certainly, the notes are nowhere mentioned in it. The second of the two writings neither identifies them as the property of the complainant, nor assigns them. That writing was executed after all the trustees had signed a deed conveying to the maker of these particular notes the land for which they were given. So, we think, the record is to be understood. But be this comparison of dates correct or not, to what extent does the second writing deal with notes given for land? It provides that the complainant is to convey land to the holders of bonds for title as fast as the notes are paid. None of the notes are specified or described, nor is it said to whom they are to be paid. Why should they not be paid to the payee, that is, to the railroad company? There surely is no inconsistency between what is stipulated and leaving the ownership of the notes in that company; more especially, when it is remembered that, by the previous instrument, it was settled that the complainant was to have for the land which had then been sold, not money or notes, but railroad stock. We do not find in either of the two writings, or in both together, any assign-

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ment, express or implied, of the notes involved in the present cause.

3. There is evidence in the record tending to show that the notes were paid, or partially paid, while they were in the hands of the railroad company. There is also evidence, on the part of the complainant, tending to show a contract between the complainant and the defendant, by which the latter undertook to pay the notes to the former, receiving for the undertaking a valuable consideration. This transaction between the parties themselves is said to be sufficient to estop the defendant from taking the benefit, as against the complainant, of any payment which had before been made to the railroad company. The suggestion is, that having recognized the notes as subsisting debts, and having, as a consequence of that recognition, obtained the complainant's money, the defendant cannot now be heard to say that the notes were previously extinguished, in whole or in part. It is further suggested that the want of any assignment of the notes from the payee to the complainant, is supplied by this direct undertaking of the defendant to pay them to the complainant. The two-fold purpose of cutting off the defense of payment (which is set up in the answer) and of excluding all question of the complainant's title to the notes, is thus said to be accomplished. But neither the contract nor the consideration for it is alleged in the bill. The bill is a suit upon the notes, and not upon the contract with the complainant to pay them: *10 Georgia Reports, 329.*

4. There is certainly a well established doctrine in the law that admissions acted upon in acquiring *chooses in action* will estop the debtor from setting up prior payment: *2 Leading Cases in Equity, Part 2, page 237.* But the present case is not one to which the doctrine applies, for both the instruments examined under the first head of this opinion were executed before the debtor made any admission to the complainant in respect to these notes. If these instruments were sufficient to pass title to the notes into the complainant, the complainant already had title when the alleged admissions

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were made. If they were not sufficient (and we have seen they were not) then the evidence fails to show any purchase of the notes by the complainant, either before or after the making of the admissions. The very truth of the matter is, that we are unable to discover from the record when or how the notes became the complainant's property.

Judgment reversed.

WESLEY C. WORRILL, plaintiff in error, *vs.* VIRGILIUS M. BARNES, defendant in error.

1. Title to the crop raised on rented land is not in the landlord so as to empower him to sue for and to recover it in trover, or, waiving the *tort*, to sue for its value in *assumpsit*. He has a special lien upon it, attaching from its maturity, but to be enforced by distress warrant: Code, sections 1976, 2285.
2. It follows that suit upon an account thus: "Wesley C. Worrill to Virgilius M. Barnes, Dr. To one bale of cotton, received from W. J. Paschal, belonging to Barnes, for rent from Paschal, weighing three hundred and sixty-five pounds, \$43 56," cannot be maintained, where Paschal had sold the same to Worrill, especially if the latter were an innocent purchaser without notice that rent was due, but believing it was paid by other property.
3. The special lien which covers the crop from maturity is only for the rent of the land which produces it; all other liens for rent attach only from date of levy by distress warrant. So that, as the rent of the land producing this cotton was only \$30 00, and the judgment was for more, \$40 00, even if a distress warrant had been levied after the cotton was bought by Worrill, it could have availed only for \$30 00, the amount of the special lien. Code, sections 1977, 2285, 2286.

Landlord and tenant. Lien. Distress warrant. Before Judge GIBSON. McDuffie Superior Court. March Term, 1876.

Reported in the opinion.

H. C. RONEY, by brief, for plaintiff in error.

PAUL C. HUDSON, for defendant.

Worrill *vs.* Barnes.

JACKSON, Judge.

1. Barnes sued Worrill for \$40 00, the proceeds of one bale of cotton, in the county court, and judgment was rendered for plaintiff; the case was carried by *certiorari* to the superior court, and there the judgment of the county court was affirmed. Worrill, being still dissatisfied, brought the case to this court, and the question is whether, under the facts, Barnes can recover the value of this bale of cotton from Worrill. Those facts are, that one Paschal rented from Barnes, *as agent*, a house and lot, at the price of \$120 00, and from Barnes, *individually*, a blacksmith shop at \$25 00, and ten acres of land at \$30 00. The bale of cotton was raised on this ten acre lot of land, and was sold by Paschal to Worrill, and Barnes sued for its value on an account, as follows: "1875. Wesley C. Worrill to V. M. Barnes, Dr. To one bale of cotton received from W. J. Paschal, belonging to Barnes, for rent from Paschal, weighing three hundred and sixty-five pounds, at twelve cents, \$43 56." No distress warrant had ever been sued out and levied on this cotton, but title to it was asserted by Barnes, because it was raised on his land, and Paschal, his tenant, sold it to Worrill. If this cotton was raised on Barnes' land he had a special lien upon it to pay for the *rent of the land*, but not of the house and lot or of the blacksmith shop. The rent of the land was but \$30 00, yet he recovered \$40 00, too much, even if he had followed the law and distrained for his rent. So that both courts below, we think, were clearly wrong in awarding a judgment for the \$40 00 on this ground. But did Barnes have title to the cotton so as to sue for it in trover, or to waive the *tort* and sue in *assumpsit*, which he seems to have done? It would be queer if he had a lien on his own property; yet, the statute gives him a lien on this cotton, therefore it would seem that this cotton was not his, but Paschal's, and that he had a lien only upon it, not a title to it.

2. It is true, that in 41 *Georgia Reports*, in two cases, this court held that a homestead, or exemption, rather, could not be taken in the produce of a farm until the rent was paid;

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but in those cases the property was distrained, and the contest was between the distress warrant and the homestead. And it is true, that in one of those decisions, or opinions, there is language to the effect that title does not inhere in the tenant till the rent is paid; but we apprehend that the meaning is, that the tenant holds the property subject to the rent, not that the absolute title is in the landlord, but that he has a lien for rent superior to the exemption rights of the tenant. That is the decision in both cases, and we think it sound: 41 *Georgia Reports*, 95, 622. That this is the meaning and the whole scope of the judgment, we think will appear from 50 *Georgia Reports*, 213, 590, and 52 *Ibid.*, 656, where the title is evidently treated as in the tenant, but subject to the lien of the landlord for rent.

3. So, too, the Code, section 1977, does not vest title, but only a lien, special for rent of the land that made the crop, good from its maturity, but general in respect to other rent, and good only from levy. Both are to be enforced by distress warrants, for the statute says expressly: "The special liens of landlords shall date from the maturity of the crop, unless otherwise agreed on, but shall not be enforced by distress warrant until said rent is due, unless the tenant is removing his property," etc. We are not aware of any law which would authorize the landlord, without a distress warrant, to sue for the entire property, or its value, and recover it, especially if it be in the hands of a purchaser for value, without notice that rent was due on it. It seems, too, in this case, that other cotton, corn, fodder, etc., was levied on by distress warrant; if so, it would seem right that it should go to satisfy this special lien for rent of the land which raised it, before the landlord could distrain under his special lien and recover from an innocent purchaser.

In view of all the facts of this case disclosed in the record, we feel constrained to differ from the county court and the superior court of McDuffie, and to reverse the judgment.

Judgment reversed.

Harris *vs.* Bridges.

**BYRD HARRIS, plaintiff in error, *vs.* THEODORE U. BRIDGES,
jailor, defendant in error.**

1. Imprisonment under bail process, issued in an action of trover for personality, is not in violation of the provision of the constitution of 1868, which declares that "there shall be no imprisonment for debt."
2. Proof by the defendant of his inability to produce the property sued for, on the return of a writ of *habeas corpus*, issued at his instance, would not authorize his discharge.

Constitutional law. Trover. Bail. *Habeas corpus*. Before Judge GOULD. City Court of Augusta. At Chambers. February 8th, 1876.

Reported in the decision.

C. H. COHEN, for plaintiff in error.

F. W. CAPERS; E. M. HABERSHAM, by FRANK H. MILLER, for defendant.

WARNER, Chief Justice.

This case came before the court below on a writ of *habeas corpus*, the petitioner therefor alleging that he was illegally detained in the custody of the keeper of the common jail of Richmond county. On the return of the writ, the jailor produced the body of the petitioner, Byrd Harris, and showed as cause for his imprisonment and detention a bail writ and process, in an action of trover for the recovery of personal property, sued out by the plaintiff therein against the said Harris, under the provisions of the 3418th, 3419th and 3420th sections of the Code, and which had been duly served. On the hearing of the motion for the discharge of the petitioner, he offered to prove his inability to produce the articles of personal property for which the action of trover was brought, which the court refused to allow him to do, and remanded the petitioner to jail; whereupon the petitioner excepted.

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1. The constitution of 1868 declares that "there shall be no imprisonment for debt." By the law of this state the owner of personality is entitled to the possession thereof, and any deprivation of such possession is a *tort*, for which an action lies: Code, section 3026. The object of the act of 1821, (the provisions of which are substantially embodied in the Code) as declared by the preamble thereto, was the more effectually to quiet and protect the possession of personal property, and to prevent the taking possession thereof by fraud or violence: Cobb's Digest, 481. The bail required in actions of trover for the recovery of personal property, under the provisions of that statute, and the proceedings authorized by it, cannot, in any legal sense, be considered as an imprisonment for debt. If one man obtains the possession of the personal property of another by fraud or violence, or having possession of it, and there is reason to apprehend that it will be eloigned or moved away, or will not be forthcoming to answer the judgment that may be made in the case, there would seem to be no good reason why he should not be proceeded against, and be required to comply with the terms of the statute made and provided for such cases; and if the defendant should be imprisoned, in accordance with the terms of the statute, on his failure to comply therewith, he cannot be said to have been imprisoned for *debt*. The theory of the statute is to prevent the taking possession of personal property by fraud or violence, and thereby prevent the true owner thereof from recovering it, and also to prevent a breach of the peace in attempting to do so, by requiring the defendant to enter into a recognizance, with security, for the forthcoming of the property to answer the judgment in the case, and if the defendant fails to give such security, then it is made the duty of the sheriff, or other lawful officer, to seize the property and deliver it over to the plaintiff, upon his entering into like recognizance, with security; and if the property is not to be found, and cannot be seized by the sheriff, or other lawful officer, the defendant shall be committed to jail, to be kept in safe and close custody, until the said personal property shall

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be produced, or until he shall enter into bond, with good security, for the eventual condemnation money. In the case now before us, the defendant failed to enter into a recognizance, with security, for the forthcoming of the property, as required by the statute, and the property sued for was not to be found, so that it could be seized by the sheriff and delivered over to the plaintiff; and the sheriff, in obedience to the express mandate of the statute, committed the defendant to jail, where the statute declares that he shall be kept in safe and close custody until the personal property sued for shall be produced, or until he shall enter into bond, with good security, for the eventual condemnation money. The defendant not having produced the property, nor offered to enter into bond, with good security, for the eventual condemnation money, the court remanded the defendant to jail.

3. The defendant offered to prove, at the hearing, his inability to produce the property sued for, and the question is, if he had been allowed to do so by the court, whether proof of that fact would have authorized his discharge in view of the provisions of the statute? The *inability* of the defendant to produce the property, is not made by the statute one of the grounds for the defendant's discharge; he may have sold the property and put the money in his pocket, and thus have placed it out of his power to produce it. The production of the property, or entering into bond with good security for the eventual condemnation money, are the only terms prescribed by the statute upon which the court was authorized to discharge the defendant from custody. It is not the business of the courts to make the law, but to enforce the law as it is prescribed by the supreme power of the state, which, in our judgment, the court below has done in this case. The 4023d section of the Code declares that no person shall be discharged, upon the hearing of a writ of *habeas corpus*, where it appears that the detention is authorized by law.

Let the judgment of the court below be affirmed.

Tison & Gordon vs. Howard.

TISON & GORDON, plaintiffs in error, vs. P. J. HOWARD, defendant in error.

1. Bills of lading are symbolic of the property they represent, and though transferable so as to pass title to the property in a transaction intended to have that effect, are not, in the full commercial sense, negotiable paper, and are not attended with all the incidents of such paper in favor of *bona fide* purchasers.
2. In strict law, the proper person to pass a bill of lading by indorsement is the consignee, not the consignor : 1 Peters, 386.
3. Where a planter consigned cotton by railroad to a factor, taking therefor, from the carrier, an original and a duplicate receipt, both of them representing him as consignor and the factor as consignee, and indorsed both receipts in blank, forwarding the original, or causing it to be forwarded, by mail, to the factor, without any accompanying letter, and depositing the duplicate in the hands of his own banker for safe keeping, giving no authority to use or part with it; and, thereupon, the banker, without his principal's knowledge or consent, indorsed the duplicate to the factor, and sent the same to the factor, assuming to control the cotton as if it were his own, when, in fact, he had made no purchase of it, and had no authority to sell it, without orders to do so; and the factor, while in possession of the cotton, and of the duplicate receipt thus indorsed (by the planter, in blank, and by the banker to the factor,) and of letters of advice from the banker touching the shipment and giving instructions as owner, paid the banker's drafts to an amount exceeding the value of the cotton, looking to the cotton as security, and believing it to be the property of the banker, and having received from the planter no instructions whatever, and no notice of his title other than that implied in the fact, as shown by both receipts, of his being the consignor—the planter's title to the cotton was not lost or impaired; and, although the banker became insolvent, the factor obtained no lien upon the cotton for his advances, and no right to withhold the proceeds from the planter, the true owner and his real principal in the consignment : 115 Mass., 224.

Factors. Negotiable instruments. Bills of lading. Indorsement. Before Judge HALL. Monroe Superior Court. March Term, 1876.

Howard filed his bill against Tison & Gordon and Lampkin & Company, to recover the value of certain cotton consigned to the former, and damages for the conversion of the same, making the case presented by the 3d head-note above. The jury found for the plaintiff. Tison & Gordon moved for a new trial upon the following, among other grounds:

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1st. Because the court erred in charging the jury as follows: "That the fact that Lampkin & Company may have been indebted to Tison & Gordon at the time the cotton was shipped, and that Tison & Gordon may have appropriated the proceeds of the sale to the payment of such indebtedness, will not estop Howard from setting up claim, although, by his act, they may have been led to believe that the title was in Lampkin & Company."

2d. Because the court erred in charging the jury as follows: "If Lampkin & Company did not draw specially on the cotton in controversy, but drew generally, and defendants had cotton sufficient besides this to pay the drafts, then they could not charge up the drafts as advances on this cotton."

The motion was overruled and Tison & Gordon excepted.

BECK & BEEKS, for plaintiffs in error.

HAMMOND & BERNER; R. E. LESTER; CABANISS & TURNER, for defendant.

BLECKLEY, Judge.

Bills of lading are often mentioned in the books as negotiable instruments; and so they are, in a general sense, for they are symbolic of the property which they describe, and when there is a design to pass the property, that purpose may be accomplished by transferring the bills. But where the common law prevails and no statutes have been passed to better their standing, bills of lading do not enjoy the full dignity of negotiable paper, proper; that is, the mere possession of them in a state apparently regular, and under circumstances apparently innocent, does not always enable the holder to negotiate them with full protection to a *bona fide* purchaser. If they are stolen, or procured from the owner by fraud, or entrusted to an agent for mere custody and safe keeping, they occupy much the same, or perhaps exactly the same, position that the property itself would occupy if it were thus dealt with instead of the bills which represent it. That they are on a dif-

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ferent footing from the negotiable paper of commerce, strictly so-called, is hardly questionable: Story on Bailments, sections 296, 323; Smith on Contracts, 446, note. The case before us is not a case of the actual sale of the bill by the bankers, the persons with whom it was deposited. The bankers did not even draw, in express terms, on the cotton mentioned in the bill of lading. Their drafts paid by the factors were drawn generally—not on this particular cotton. The bankers did not make any express pledge of the cotton or of the bill of lading. The lien claimed by the factors is for a general balance which is due them from the bankers. The owner, himself, was the consignor of the cotton, and this appeared on the face of the bill of lading. The factors were the consignees, and were thus the factors of the owner, as to this consignment. We do not think the cotton can be treated as lawfully sold, or as lawfully pledged by the bankers, or, that for any other reason found in the record, the factors can be excused from accounting to their consignor.

Judgment affirmed.

SPERRY & NILES, plaintiffs in error, *vs.* CAROLINE E. HASLAM, defendant in error.

1. **The right to reduce to possession** the distributive share of a wife in the estate of her father, who died before the act of 1866, was a vested right in the husband, and if he reduced the same to his possession, as his own estate, after the act of 1866, it became his property, and was subject to his debts; if he reduced it to his possession for her, and as her estate, after said act, and, in consideration of having used it as her property, conveyed to her a tract of land in lieu thereof, the title to the said land is in her, and his creditors cannot condemn the same for his debts.
2. **A charge of the court, therefore, to the effect "that if the jury believed from the evidence that George S. Haslam, senior, received from the administrator of his wife's father, after the 13th of December, 1868, any money or notes, that it was her money and not his; and that if in payment of said debt he sold land to her before the judgment of plaintiff in *s. s.*, she got a good title, and the property is not subject; that the whole question turns**

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upon the time he received the money or notes from the estate of his wife's father—if before the 13th of December, 1866, it was his; if after that, it was hers," is too broad, the question being, in the judgment of this court, in what capacity or character did he receive the distributive share—if as his own, then he reduced it to possession for himself, and the fund so received would not support the deed against creditors; but if he received it as her property, then it would be a valuable consideration to support his deed for the land to her.

3. There is some evidence in the record to show that the husband did collect the wife's distributive share for her, and did so use it for her until he made the deed to her to the land in dispute, in consideration of the debt he owed her for it, and as it is not contradicted, we would be inclined to let the verdict stand, notwithstanding the charge, but for the fact that the record discloses, from a recital in the *fl. fa.*, that though the *fl. fa.* was issued in 1875, the judgment was obtained in 1870, three years before the deed from the husband to his wife. Though this recital may be a mistake, yet it is not contradicted, and no diminution of the record was suggested therefore a new trial is ordered, when the principle above indicated will be applied.

Husband and wife. Title. Levy and sale. Before Judge HILL. Houston Superior Court. May Term, 1876.

Reported in the opinion.

R. F. LYON; C. C. DUNCAN; W. H. REESE, for plaintiffs in error.

WARREN & GRICE; W. S. WALLACE, for defendant.

JACKSON, Judge.

Sperry & Niles sued out a *fl. fa.*, issued in 1875, upon a judgment obtained in 1870, (?) as the *fl. fa.* recites, and levied it upon a tract of land of defendant, George S. Haslam, Sr.; the land was claimed by Mrs. Haslam, under a deed made in 1873; the jury found the land not subject under the charge of the court, to which charge plaintiffs excepted, and assign the same as error here. The charge was "that if the jury believe from the evidence, that George S. Haslam, Sr., received from the administrator of his wife's father, after the 13th of December, 1866, any money or notes, that it was her money and not his; and that if, in payment of said debt, he sold land to

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her before the judgment of plaintiff in *fl. fa.*, she got a good title, and the property is not subject. The whole question turns upon the time he received the money or notes from the estate of his wife's father; if before the 13th December, 1866, it was his; if after that, it was hers."

1. The 13th of December, 1866, is the date of our act vesting all property inherited by the wife as her separate estate; and the idea of the court below evidently was, that the husband had no right vested in him to the wife's inheritance before that act, until it was reduced to possession by him; and hence, if not reduced to possession before the 13th of December, 1866, that act gave it to the wife, and did not conflict with the constitutional provision in respect to interference by legislation with *vested rights*. But we think that the right of the husband to reduce to possession such an estate inherited by the wife, was a vested right, and it was so distinctly ruled by the court of appeals of New York, in the case of *Westervelt vs. Gregg*, 2 Kernan, 202. Moreover, it was held by our own court, in 25 *Georgia Reports*, 622, that the right of the husband, though he had not reduced it to possession before death, if he survived the wife, descended to his heirs, who would take in preference to the wife's heirs.

2. We think, therefore, that this charge of the court below was too broad; and that if the husband had reduced the property to possession, as *his own property*, though after the act of 1866, it would have been his and not hers, and that he could not have turned over to her his land, in consideration of its being hers, so as to defeat his creditors; but there is some evidence in the record that he reduced this distributive share to possession, not for himself, but for her; and held and used it as her property, not his own. The true question in the case, it appears to us, is raised on this state of facts; or rather, this hint of the facts, for they are not distinctly sworn to. Did the husband, as agent for his wife, get this property from the administrator of her father, and use it as hers? If so, it was hers, and it would support her deed, if made before judgment; but if he got it as his own, and re-

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duced it to possession for himself, and thus asserted his marital rights, the whole title to it vested in him, and he could not convey his land to her for any such consideration, to the injury of any creditor of his at the time. Indeed, in 24 *Georgia Reports*, 631, it was ruled that if a husband so received from an administrator, the estate of his wife, and made her a conveyance thereto, that the title to her was perfect, on the principle that a court of equity would have forced a settlement by the husband, upon her, and that the parties could do, *without a law suit*, whatever they would be made to do *at the end of it*. Equity, especially, always considers that done which ought to be done, and would not be guilty of the absurdity of forcing people to *litigate and expend money to have done what they were willing voluntarily to do*.

3. Inasmuch as there is some evidence to show that this was done in this case ; that the husband got the money, which was the consideration of the deed, for his wife, and so used it, notwithstanding the wide charge of the judge, we should be inclined to let this verdict stand, but for the fact that the copy *fi. fa.* in the record shows the date of the judgment 1870, three years before the deed of Haslam to his wife, and that the lien of the judgment had attached before the deed had been made to the wife, and that however valuable the consideration for it, it conveyed no title to her against this older judgment. This may be an error in the transcript of the record, as the *fi. fa.* is dated in 1875 ; but as it recites that the judgment was rendered in 1870, and there is no diminution of the record suggested, or any contradictory evidence, we must reverse the judgment and order a new trial, especially as the court charged the law wrong on the main point, and on another trial there may be conflicting evidence on the point on which we put the case.

Judgment reversed.

Sutton *vs.* Aiken.

JEREMIAH J. SUTTON, plaintiff in error, *vs.* ISAAC M. AIKEN,
trustee, defendant in error.

In ejectment brought upon a legal title, plaintiff cannot prove and recover on an equitable title. If the latter title be relied on, it must be set forth in the pleadings.

Ejectment. Title. Evidence. Before Judge TOMPKINS.
McIntosh Superior Court. November Term, 1875.

The following, taken in connection with the decision, sufficiently reports this case:

Defendant moved for a new trial on the following, among other grounds:

Because the court allowed the plaintiff to introduce evidence as follows: The premises in dispute belonged to plaintiff's wife—were bought with her money. There was an execution, issued from the United States court, against plaintiff individually; one Epping agreed to advance the money necessary to satisfy it, and take a deed to the property, as security; when this was presented to Mrs. Aiken for her signature, she refused to sign it, and only did so as a collateral security, after representation from Epping's counsel that it was necessary, in order to carry out the agreement between her husband and said Epping, and that the property should be so represented to the latter that he would hold it in reserve for her. Plaintiff served upon defendant written notice protesting against the sale by Epping to him.

The motion was overruled and defendant excepted.

MELDRIM & ADAMS; L. E. B. DELORME; JACKSON,
LAWTON & BASINGER, for plaintiff in error.

No appearance for defendant.

WARNER, Chief Justice.

This was an action of ejectment brought by the plaintiff against the defendant to recover the possession of certain

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described land therein mentioned. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the plaintiff. The defendant made a motion for a new trial on the several grounds therein set forth, which was overruled by the court, and the defendant excepted.

It appears from the evidence in the record that the plaintiff introduced a deed from Rhett, dated 2d November, 1868, conveying the premises in dispute to him, as trustee of Fannie M. Aiken, to have and to hold the same for her, the said Fannie M., her heirs and assigns, forever. The plaintiff also offered in evidence a deed executed by himself, as trustee for the said Fannie M., and the said Fannie M., dated 13th of June, 1870, conveying the premises in dispute to Carl Epping for the consideration of \$1,629 00. The defendant, Sutton, claimed the premises under a deed made by Epping to him therefor, dated 5th of June, 1873. The plaintiff sought to prove, on the trial of the ejectment suit, that Fannie M. Aiken, his *cestui que trust*, was his wife, that it was her money that paid for the land, and therefore she was equitably entitled to recover it from the defendant. It will be noted that the plaintiff seeks to recover the possession of the land upon his legal title alone; that there are no allegations in his declaration of the equitable rights of his *cestui que trust*, which he sought to prove at the trial, which would have authorized the introduction of evidence in relation thereto. In other words, the plaintiff's declaration sets forth a legal cause of action alone, and at the trial he sought to introduce evidence of equitable grounds of relief, without any averments in his declaration to authorize him to do so. In *Jones vs. Parker*, 55 *Georgia Reports*, 12, this court held that a court of law has no more power to administer equitable remedies without equitable rights are alleged, than has a court of equity. If the plaintiff, or his *cestui que trust*, is entitle to any equitable relief in relation to the property sued for, let him distinctly allege it in his declaration so as to put the defendant upon notice as to what that equity is, that he may be prepared to meet it. Good pleading, either in a court of law or in a court

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of equity, is a logical statement of the facts upon the record, and no case ought to be tried until that is done, so that the records of the courts may show what issues have been tried and decided. In view of the pleadings in this case and the proceedings had thereon at the trial, as disclosed in the record, the court erred in overruling the defendant's motion for a new trial.

Let the judgment of the court below be reversed.

CHARLES A. NUTTING *et al.*, plaintiffs in error, vs. OSCAR THOMASSON *et al.*, defendants in error.

(JACKSON, Judge, having been of counsel, did not preside in this case.)

1. Dividends on stock correspond to the hire of property. The purchaser of railroad stock from an administrator, at an unauthorized private sale, is liable in equity to the distributees of the estate to which the stock belonged, for all damages resulting directly from the conversion, including, besides the value of the shares, the consequent loss of dividends, with interest thereon. The dividends to be treated as lost, are all those innocently paid by the corporation, after the illegal purchase and up to the time of the decree, whether paid to the purchaser himself, or to those holding under him, immediately or remotely, by regular transfer.
2. Payments to innocent transferees are all innocent payments, unless the corporation is chargeable with some negligence or breach of faith or duty, in suffering the transfers to be made on its books.

Stock. Dividends. Sales. Before Judge BARTLETT. Bibb Superior Court. October Term, 1875.

This is the fourth time this case has been before this court: See 40 *Georgia Reports*, 408; 43 *Ibid.*, 598; 46 *Ibid.*, 34.

The contest here was over the dividends on the railroad stock, which had been paid to the purchasers thereof from Nutting and Cubbedge & Hazlehurst, who held under an illegal private sale made by Usher, as administrator of Wake-man. The court charged the jury that Nutting and Cubbedge & Hazlehurst were liable to the distributees of the Wake-man estate, not only for the dividends received by them, but

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also for the dividends received by the purchasers from them, with interest thereon, and refused to charge to the contrary.

The court also charged that the railroad company was not liable for such dividends, and refused to charge to the contrary.

A verdict was returned in accordance with the charge. The defendants Nutting and Cubbedge & Hazlehurst, moved for a new trial on account of alleged errors in the aforesaid charges and refusals to charge.

The motion was overruled and they excepted.

A. O. BACON; JAMES T. NISBET, for plaintiffs in error.

WHITTLE & GUSTIN; R. F. LYON; C. C. DUNCAN, for defendants.

BLECKLEY, Judge.

The rulings made in this litigation, heretofore, settle most of the principles involved in it: See 40 *Georgia Reports*, 408; 43 *Ibid.*, 598; 46 *Ibid.*, 34. As to dividends which would have been realized by the distributees had the stock not been unlawfully converted, they seem to us to stand upon the footing of hire; and those who aided the administrator in the conversion, that is, the purchasers from him at the unauthorized sale, are liable for them. It would seem to make no difference, in principle, whether the dividends were paid directly to such purchasers or to those holding the stock under them by regular transfer. In either case, the loss of the dividends is traceable to the conversion. That is the act causing the damage, and full compensation to the distributees requires that all dividends of which they have been deprived up to the time of decree should be accounted for, with interest. The innocence of the railroad company in the original transaction has been adjudicated. The want of notice by the company that the administrator was abusing his trust gave the company protection. It does not appear that any dividend has been wrongfully paid by the company since it re-

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ceived notice. That is, there is no evidence that the company could have protected itself against the payment of any of the dividends which holders of the stock have received. There seems to be little doubt that holders under the original purchasers took without notice, and are innocent holders. Of course, they had a right to collect dividends, and the company was not chargeable with any wrong in paying them.

We cannot sanction the theory that some of the purchasers from the administrator are excused, because they acted as factors or brokers in behalf of a third person. The facts show that the so-called principal was not known in the transaction until after the administrator had parted with the property and the conversion was complete. The administrator transferred directly to the brokers, and they transferred afterwards to the person they claim to have represented.

The consent arrangement made by the parties touching the stock and a portion of the dividends could not, as we think, prevent the complainants from recovering the remaining dividends under the same rules of law which would have been applicable to the case if no part of the litigation had been closed by consent. The question as to these disputed dividends was expressly left open, and the meaning of the arrangement was, no doubt, that this question was to receive the same solution as if it had not been severed from the balance of the case.

Judgment affirmed.

ISAAC RUSSELL, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. An indictment for malpractice in office alleged that, at a specified time and place, a possessory warrant was tried before the defendant, a justice of the peace of Chatham county, possession of the property was awarded to the plaintiff, and an execution issued against the defendant therein for costs; that, when the plaintiff demanded possession, the justice refused to deliver the property, had an entry of *nulla bona* made on the execution, and a levy

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made on the property in dispute, although plaintiff offered to point out property belonging to the defendant:

Held, that a motion in arrest of judgment, on the ground of faulty pleadings, was properly overruled.

2. There was no error in requiring the defendant to produce his docket and such official papers as were relevant to the issue.
3. Parol evidence was not competent to prove the contents of such papers, until the production of the original had been sought in the manner prescribed by law, or their loss or destruction shown.
4. The court erred in ruling that the solicitor general had a right to argue that defendant's unwillingness to produce his official papers was a virtual confession that they would criminate him.
5. The jury having nothing to do with the punishment prescribed, the better practice is not to give the law concerning it in charge.

Criminal law. Malpractice. Production of papers. Evidence. Practice in the Superior Court. Before Judge TOMPKINS. Chatham Superior Court. February Term, 1876.

The following, taken in connection with the decision, sufficiently reports this case:

Defendant made a motion in arrest of judgment on the following grounds: 1st. Because the indictment does not set forth the elements necessary to constitute an offense. 2d. Because it does not set forth the merits of the complaint.

Defendant also moved for a new trial, on the following, among other grounds:

1st. Because the court granted an order requiring defendant to produce his official docket and the papers in the possessory warrant case, and admitted them in evidence.

2d. Because the court admitted parol evidence to show the contents of the execution alleged to have been issued against Hancock, the plaintiff, the course pointed out by law for the procurement of the original not having been pursued.

3d. Because the court refused to interfere, at the instance of defendant's counsel, when the solicitor general stated in argument that defendant had confessed his guilt when he protested against an order requiring him to bring his papers into court, because he admitted that the evidence of the papers would criminate him.

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4th. Because the court charged that the punishment for this offense was not as in cases of misdemeanor usually, but was only fine or imprisonment in the jail (without labor in the chain-gang, in the discretion of the court,) and removal from office, but did not charge that a person so convicted could not register, vote, or hold office. Also because the court charged that the jury could recommend to mercy, but did not state that such recommendation would not prevent the above penalties.

Both motions were overruled, and defendant excepted.

JOHN M. GUERARD; **R. E. LESTER**, for plaintiff in error.

A. R. LAMAR, solicitor general, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of malpractice in office as a justice of the peace, and on his trial therefor, was found guilty. The defendant made a motion in arrest of judgment, and also a motion for a new trial, on the several grounds therein set forth, both of which motions were overruled by the court, and the defendant excepted.

The malpractice in office, with which the defendant is charged, consists in his issuing an execution against the plaintiff, in a possessory warrant case tried before him, for the sum of \$14 75, after deciding that the plaintiff was entitled to the possession of the property, and causing the same to be levied on the plaintiff's property to enforce the collection of said costs, and in directing Crean, a constable, to make a return on a *f. fa.* issued against Jones, the defendant, in said possessory warrant case for said costs, that he could not find any property of Jones to levy on to satisfy it, when the said plaintiff offered to point out property of Jones sufficient, and liable thereto, to satisfy the same, and in refusing to order the property to be turned over to the plaintiff until said costs were paid, etc.

1. The motion in arrest of judgment was properly overruled. The indictment specially set forth the merits of the

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complaint against the defendant as a justice of the peace, as required by the 4504th section of the Code. Whether the defendant acted wilfully, oppressively, or with tyrannical partiality unbecoming the character of an upright magistrate, or whether his acts were merely errors of judgment in regard to his official duty, were questions to be determined from the evidence, the presumption being in favor of the defendant.

2. There was no error in requiring the defendant to produce his official docket and the official papers in the case of Hancock against Jones. Requiring a defendant to produce his private papers, his private property, to be used as evidence against him, is one thing, but to require a public officer to produce the official records and papers in his office, the property of the public, to be used on the trial of a case in which his official conduct is involved, is another and quite a different thing in the eye of the law.

3. The allowing parol evidence to be introduced by the state of the contents of the execution alleged to have been issued by the defendant against Hancock on the 29th of November, 1875, without first having pursued the course pointed out by law to procure the original execution, or have shown its loss or destruction, was error. That execution was a material paper in the case, and the court had quite as much power to have required the defendant to produce that paper as any of the other papers appertaining to the possessory warrant case.

4. The court also erred in deciding, when its attention was called to the concluding argument of the solicitor general to the jury, by the defendant's counsel, "that the solicitor general could legally argue that facts in evidence were really admissions by the defendant of the offense laid to his charge," thus assuming, in the presence and hearing of the jury, that the statement made to them by the solicitor general, and which was complained of by the defendant, was evidence before the jury of the defendant's admission of the offense with which he was charged. It appears from the record and bill of exceptions that, during the progress of the trial, the de-

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fendant's counsel protested and objected against the right of the court to compel him to produce the papers in the possessory warrant case, to be used as evidence against him, which protest and objection the court overruled. The solicitor general, in his concluding argument to the jury, stated "that when the defendant, by his attorney, protested against being compelled, under the order of the court, to produce the papers mentioned in that order, he had confessed his guilt of the crime wherewith he was charged in the indictment, because he had, by such protest, *admitted* that the evidence contained in said papers would criminate him;" when the defendant, by his counsel, called the attention of the court to the above mis-statement, and requested that the same should be corrected, the court refused to do so, but sustained the assumption of the solicitor general before the jury, that the assertion by the defendant of what he deemed to be his legal rights before the court, was evidence of an admission of his guilt, whereas the assertion of his legal rights before the court, through his counsel, was no evidence of his guilt whatever, for the consideration of the jury, and the statement of the solicitor general in his argument to the jury that it was an admission of guilt, should have been corrected by the court instead of being indorsed by it. This error was well calculated to have injured the defendant on the trial of the case, and most probably did injure him.

5. In regard to the charge of the court as to the punishment of the defendant in this class of cases, we would simply remark, that the jury have nothing to do with the punishment prescribed by law for the offense, and it is much the better practice for the court to say nothing about it in its charge to them.

Let the judgment of the court below be reversed.

Gouldsmith *vs.* Coleman.

WILLIAM GOULDSMITH, plaintiff in error, vs. SUE M. COLEMAN, administratrix, defendant in error.

1. Though a widow be the sole distributee of her intestate husband's estate, and though the whole estate be subject to be set apart to her for year's support, she has no legal authority, before it is so set apart and before administration is granted, to deliver personal property of the estate to a creditor of her deceased husband in payment of his debt, even if the debt be, in part, for the purchase money of the same property.
2. When, soon after thus disposing of the property, the widow obtains letters of administration, she may, as administratrix, recover the property or its value, from the creditor, in an action of trover or complaint, if the creditor, on demand, refuse to surrender it for due administration. She is not estopped, as administratrix, by the prior unlawful sale made by her as an individual.

Administrators and executors. Year's support. Estoppel.
Before Judge McCUTCHEON. Bartow Superior Court. February Term, 1876.

Mrs. Coleman, according to the evidence for the defendant, a few days after her husband's death, and before the administration upon his estate, turned over certain articles of household furniture, etc., to Gouldsmith in settlement of an indebtedness due to him by the deceased, created in part for such furniture. She subsequently administered upon the estate of the deceased, and the defendant having failed to return said property on demand, she instituted an action of complaint therefor. Two points were presented for the defense, to-wit: 1st. That Mrs. Coleman being the sole distributee of said estate, and being entitled to all of said property for her year's support, had authority to make such disposition of the property aforesaid. 2d. That by such disposition of the same, she was estopped from maintaining an action of trover therefor as administratrix.

The court charged the jury as follows: "If the evidence shows that the property sued for belonged to the plaintiff's intestate at the time of his death, it would remain the property of his estate after his death until it should be administered, or otherwise disposed of according to law, and if any one, after

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the death of the intestate, without authority of law, got possession of the property, the administratrix of the estate would be entitled to recover it. If the widow of the intestate, before administration upon his estate, sold or turned over the property, or any of it, to defendant, and if afterwards administration was taken out on the estate, the administratrix, as such, would be entitled to recover the property of the estate, and would not be prevented from so doing by reason of any contract made with the widow of the intestate before administration."

The jury found for the plaintiff. The defendant moved for a new trial on account of error in the aforesaid charge. The motion was overruled and the defendant excepted.

WILLIAM T. WOFFORD ; R. B. TRIPPE, for plaintiff in error.

M. R. STANSELL; WARREN AKIN, for defendant.

BLECKLEY, Judge.

Though the husband, when sole heir of the wife, may pay her debts and take her estate without administration, (Code, section 1761,) there is no such provision touching the wife. Section 1762 only makes her sole heir in case of his death without lineal descendants. It does not dispense with administration, or vary the general rule laid down in section 2483, that personality vests in the administrator. Where there are no debts, the beneficiaries of an estate may distribute it among themselves, with or without administration, and, in equity at least, such conventional distribution will be maintained : 3 *Kelly*, 422 ; 13 *Georgia Reports*, 478 ; 14 *Ibid.*, 367 ; 23 *Ibid.*, 142 ; 29 *Ibid.*, 585 ; 34 *Ibid.*, 152 ; 36 *Ibid.*, 184 ; 38 *Ibid.*, 264 ; 55 *Ibid.*, 359, 449. It seems, however, that in an ordinary action at law, the administrator cannot be resisted by the fact of such distribution unless from lapse of time a due administration can be presumed : 6 *Georgia Reports*, 443 ; 7 *Ibid.*, 559 ; 31 *Ibid.*, 753. Doubtless, if all the parties interested

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were before the court, and if the defense were presented by way of equitable plea, there would, at this day, be the same rule at law as in equity, and no more occasion to invoke a presumption, from lapse of time, in the one court than in the other. But without further legislation, the obstacles to bringing into a court of law parties other than those made such by the plaintiff or plaintiffs, would be insuperable. The plea of the defendant could not introduce new parties; and hence, in many cases, the strict legal rule would have to be administered. That rule must prevail in the present case. The only parties before the court are the widow as administratrix, and one of the creditors. What may or ought to be done with the property in the due course of administration, cannot be settled in this suit. The administratrix, by virtue of the letters granted to her by the ordinary, has the legal title, and that must prevail.

2. It seems well established by authority that the administratrix is not estopped by the prior illegal sale made by her as an individual: 3 *Kelly*, 263; 10 *Georgia Reports*, 361; 4 *East*, 441; 1 *Adol. & Ellis*, 49.

Judgment affirmed.

PETER FINNEGAN, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

Where a grand jury, drawn at a term to which the superior court was adjourned by an order of the judge issued at chambers, to serve at the next regular term, found a true bill and the defendant was arraigned thereon: *Held*, that a plea in abatement setting forth the above facts, should have been sustained.

JACKSON, Judge, dissented.

Criminal law. Courts. Indictment. Jury. Before Judge CRAWFORD. Muscogee Superior Court. November Term, 1875.

Reported in the decision.

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THORNTON & GRIMES, for plaintiff in error.

W. A. LITTLE, solicitor general, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of murder, and on the trial therefor, was found guilty. A motion for a new trial was made on the various grounds of error alleged therein, which was overruled by the court, and the defendant excepted.

It appears from the record and bill of exceptions, that when the defendant was arraigned on the bill of indictment charging him with the offense, he filed a plea in abatement thereto, in which he alleged that in May, 1875, the superior court of Muscogee county was adjourned by an order of the presiding judge thereof in vacation, at chambers, for the convenience of the bar; that the court met at the time appointed in the order of adjournment; that a grand jury was impaneled and the defendant indicted for the murder of Charles Wilding, tried and convicted therefor; that judgment was arrested by the court, and a new trial ordered; that the bill of indictment was *nol. prosed* or set aside; that at the same term of the court so convened as aforesaid, the presiding judge drew another grand jury to serve at the next November term of the court, and at the next November term, the defendant was again indicted for the murder of said Charles Wilding, by the grand jury so drawn as aforesaid. To this plea of the defendant, the counsel for the state demurred. The court sustained the demurrer, and the defendant excepted.

Was the grand jury which found the bill of indictment against the defendant drawn according to law? The 3911th section of the Code declares that the judges of the superior courts, at the close of each term, in open court, shall unlock the jury box, and draw therefrom not less than eighteen nor more than twenty-three names, to serve as grand jurors at the next term of the court. The 3912th section declares that

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whenever, from any cause, the judge shall fail to draw a jury as provided by section 3911, it shall be the duty of the ordinary, together with the commissioners and clerk of the county, to draw grand jurors to serve at the next ensuing term of the court. Thus it will be perceived that the statute recognizes but two modes of drawing grand jurors to serve at the regular terms of the superior court; the one by the judge in open court at the close of each term thereof, the other by the ordinary, together with the commissioners and clerk of the county. When the statute declares that the grand jury shall be drawn by the judge in open court at the close of each term thereof, it must be construed to mean a legal term of the court, that is to say, a term of the court held in accordance with the laws of the land.

The grand jury which found the bill of indictment against the defendant, drawn by the judge at the time and in the manner alleged in the defendant's plea, was not drawn at a legal term of the superior court, according to the ruling of this court in the case of *Hoye vs. The State*, 39 *Georgia Reports*, 718, and we suppose that the verdict was set aside and the first indictment *nol. prosed* as alleged in defendant's plea, for that reason. If the term of the court at which the defendant was first put upon his trial, was not a legal term of the court for the purpose of indicting and trying him for the offense charged, how did it become a legal term of the court to authorize the judge to draw the grand jury which found the bill of indictment to which the defendant pleaded on his arraignment? To state the proposition, is to answer it. The grand jury that found the bill of indictment upon which the defendant was arraigned, was not drawn in accordance with the provisions of the act of 1873, nor does it purport to have been drawn under the provisions of that act on account of any of the special emergencies therein provided for: Code, section 3942. We do not say that if the defendant, with a full knowledge of the facts, had gone to trial without raising any objection to the indictment, that he could have taken advantage of it after verdict, but the defendant in this case did

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not wait and take his chance for an acquittal until after verdict; he pleaded to the indictment on arraignment, as required by the 4639th section of the Code, and in our judgment, the court erred in sustaining the demurrer to the defendant's plea in abatement to that indictment.

Whenever the state undertakes to deprive one of its citizens of his life or liberty, it is the duty of the courts to see that it is done in accordance with the laws of the land, and not otherwise. In the administration of criminal law, judicial discretion should not be tolerated. The *law*, as it is prescribed by the supreme power of the state, should be the rule of conduct for the courts as well as for the citizen. Inasmuch as the defendant has not been arraigned and tried upon a legal indictment for the offense of which he is supposed to be guilty, we express no opinion in relation to the other questions raised on the argument here.

Let the judgment of the court below be reversed.

BLECKLEY, Judge, concurred, but furnished no opinion.

JACKSON, Judge, dissenting.

1. The act of drawing the names of grand jurors out of the box where they are kept, is a mere ministerial act. The names so drawn at one term of the court, to be summoned to appear at the next term, do not necessarily constitute the grand jury then organized; they may not all appear, only one may appear, and yet a legal grand jury can be built upon that one from the by-standers, if only the persons qualified to serve as grand jurors be used to make up the deficiency. The essential thing is that the grand jury shall be composed of upright and intelligent persons, selected by the ordinary, the clerk of the superior court, and three commissioners appointed by the judge of the superior court. If eighteen such men, drawn by the judge of the superior court, at a regular term thereof, or at an irregular term thereof, or in vacation, or at a term illegal for other business, be summoned, by virtue of his precept to the sheriff, to appear at the next regular term of the

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superior court, and do appear, and are sworn and organized as a grand jury for said regular term, and at that regular term find a bill of indictment true, such indictment so found is sufficient, in law, to put the accused upon trial for murder; and if he be fairly tried by a lawful jury of twelve men selected by himself, and be found guilty, he must abide the sentence of the law, and should not be allowed to escape or procrastinate by any such naked technicality as a plea that the judge of the superior court had adjourned the court one week without sufficient cause, and had then, at this session, one week later than usual, performed the mere ministerial act of drawing the grand jurors for the next regular term.

2. The whole spirit of our legislation accords with the above proposition and conclusion. The act of 1799 (Cobb's Digest, page 547,) declares that *the judge*, if he should not hold the court, "shall nevertheless attend in person for the purpose of drawing jurors, or shall transmit to the justices of the inferior court in writing a request that they, or any two of them, attend at the clerk's office" for that purpose; the act of 1815 (Cobb's Digest, page 552,) declares that whenever there shall be a *failure of the judge of the superior court* to draw jurors, then the justices of the inferior court, or a majority, may act; then comes the act of 1869, (Code, sections 3911, 3912,) which declares that the judge shall draw the jury at the close of the term, and on his failure, then the ordinary and clerk and commissioners shall act; and then, to provide against all emergencies, comes the act of 1873, (Code, section 3942,) which declares, after enumerating other emergencies, that when, "*from any other cause*, such court has convened, or is about to convene, and there have been no juries drawn for the same, it shall and may be lawful for *such judge to draw juries*, so many as may be necessary for such court, and cause them to be summoned accordingly, *in the manner prescribed for drawing juries, at the close of the regular terms of such courts respectively;*" so that the duty is upon *the judge to draw juries*, and he may do so at any time so that they can be summoned as they would be if drawn regu-

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larly. If, then, he may do so in vacation, can he not at an irregular or illegal term of the court? The grand jurors who found this bill were regularly summoned and organized and sworn, were regularly qualified in every respect, and the only complaint is that the judge drew them out of the box at an irregular or illegal term. It is not pretended that defendant was hurt by it, but the complaint is purely technical, with the reason and spirit of our whole legislation against it, and not only the reason and spirit, but the letter of our last act of 1873 in its teeth.

3. This case cannot be made to fit upon the Hoye case as a corner-stone. It touches that case scarcely anywhere. There, *the court tried Hoye at a term to which it had illegally adjourned*. All the powers of the court were called into requisition to try him; the judicial mind, its skill, learning, discretion, all were invoked to try a case of life and death. Here, a child could have done what the judge did—he put his hand in the box, drew out a name, called it, and put it in the other box—a hand, an eye, a voice, were all that were necessary to do the ministerial act. The act of the court in the Hoye case was altogether judicial; here, the act of the judge is altogether ministerial. What the court did in the Hoye case, could be done only in court; what the judge did here, could be done at chambers; what the court did in the Hoye case, could be done only in term; what the judge did in the case at bar, could be done in vacation; what was done in the Hoye case, nobody but a judge of the superior court could do; what was done in the case at bar, the inferior court might have done formerly, and the ordinary, with the clerk and commissioners, can do now. What was done in the Hoye case required judicial skill, somewhat akin to that scientific skill which General Newton displayed in engineering the blowing up of the rock in New York harbor; what was done in the case at bar, the judge's child could have done as easily as General Newton's little daughter's hand applied the match which fired the train. All the judicial machinery of the court was absolutely necessary to try Hoye; the manual act of

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drawing without one particle of discretion or judgment, was all that was required to draw the grand jurors. In the Hoye case, this court held that the session at the term to which the court was adjourned, was legal for some purposes while it was illegal to try Hoye; if legal for any purpose, surely it was legal to enable the judge to do the mere ministerial act of drawing the jurors to be summoned for the next court.

4. The rulings of the court appear to me to be correct in the main and not injurious to the defendant; the charge legal and impartial, the whole trial fair, the verdict supported by the evidence, and as the presiding judge who tried it is satisfied with the finding, I dissent from the judgment of the court in ordering the case to be tried over.

RICHARD W. BONNER, guardian, plaintiff in error, *vs.* JOHN A. NELSON, defendant in error.

1. Where, in a suit between the original parties, a promissory note is resisted by a surety who signed and left it with his principal, believing and expecting that another surety was to sign also, but whose signature was not procured, the note being delivered by the principal to the payee without it, the defense, to be available, must comprehend the two elements, of incompleteness of the instrument, and notice thereof, actual or virtual, to the payee; and each of these elements must be presented in the plea so as to be distinctly issuable.
2. Without a stipulation in the contract, or some averment to that effect in the pleadings, there is no presumption that a debt owing to a guardian was, of right, payable in Confederate money, though the note was executed in 1863 and was payable in 1864.
3. For the guardian to reject a tender of payment in Confederate money, made by the principal in 1864, after the note matured, and for him also to discourage the pressing of the tender by a naked promise not to call for payment until after the close of the war, were not wrongful to the surety.
4. Such a promise, made and kept without the surety's knowledge or consent, did not discharge him, notwithstanding the principal was solvent when the promise was made, and afterwards became insolvent. It created no binding contract; and the whole transaction amounted to mere indulgence, without any act or omission contrary to the creditor's duty to the surety, who, so far as appears, gave no notice to sue or to coerce payment.

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Principal and security. Negotiable instruments. Presumptions. Confederate money. Before Judge HILL. Twiggs Superior Court. October Adjourned Term, 1875.

Bonner, as guardian, brought complaint against Woodall, as principal, and Nelson, as security, on a note dated February 18th, 1863, for \$2,610 37, payable to plaintiff or bearer, and due on January 1st, 1864. Woodall made no defense. Nelson pleaded, in substance, as follows :

1st. Three or four years prior to the making of the instrument sued on, this defendant and one Herbert Reynolds, signed a note as co-securities for Woodall for about \$2,000 00, on which the latter borrowed money from the plaintiff. After this note had been due for about three years, Reynolds, without defendant's knowledge, demanded of plaintiff that his name be taken therefrom, that is, that the plaintiff must take steps to collect it or relieve him. Plaintiff was reluctant to sue, so Reynolds had to make his demand a second or third time. Plaintiff then said to Woodall that he wanted to renew the note, giving as a reason that he wished the interest to be bearing interest for his ward, but not telling him that Reynolds had made the aforesaid demand. Thereupon plaintiff wrote the note sued on and gave it to Woodall to obtain his securities' names, requesting him to attend to it by next day. Woodall brought this obligation to defendant's house and asked for defendant's name, saying, either voluntarily or on being questioned by defendant, that he wished to renew the old note. Defendant then readily signed, supposing and expecting that the same sureties were to be upon it as were upon the old note. Woodall went from defendant direct to plaintiff and delivered to him the note, saying that he had not obtained any surety but defendant. Whereupon plaintiff replied that defendant's name made it good enough, and surrendered the old note which was destroyed. Defendant did not ascertain that Reynold's name was not on the note until about two years afterwards, when it was shown him by plaintiff's attorney for collection.

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2d. About the 22d of March, 1864, the following transaction took place between plaintiff and Woodall, without the knowledge or consent of defendant: Woodall tendered to plaintiff, in the then currency of the country, nearly the full amount of the debt, proposing to get the balance in a short time. Plaintiff made some remark about its being unpopular to refuse Confederate money, and asked Woodall not to press it on him. The latter replied, "Captain, I have the money now, and you might want it some time when I did not have it." To which plaintiff answered, "No, I will not call upon you until after the war." Woodall made some remark conjecturing that he might then be broke. Plaintiff did carry out this promise, and did not call for the money until some time after the war, when Woodall had become insolvent, though solvent when the indulgence was given.

On demurrer to these pleas, the first was stricken and the second sustained. The evidence for the defendants made substantially the case presented by the second plea. Woodall testified that at the time of tendering the Confederate money he also offered to let plaintiff have thirteen bales of cotton, to be applied to the note; that he, also, at another time, offered him a house; that these offers were declined.

The plaintiff admitted that Woodall, some time in 1864, did offer to pay a part of the note in Confederate money, saying that he had a check for about \$2,000 00, and a part in money, and could get the balance, though he showed neither check nor money. He declined to receive the money, saying the note did not belong to him, and that if it did he would take it; that he did not think it fair to his ward, who was absent in the army, but that if he saw any chance to make a beneficial investment, he would call on Woodall for the money. Admitted also the offer of the cotton, and of a house, both of which he declined. Woodall also stated that if plaintiff waited until the war was over that he and all of us might be broke; to which plaintiff replied, that if all were then broke, then all would go up together, and nothing could be made

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out of anybody. He denied the agreement to indulge until after the war.

The court, among other things, charged the jury, in substance, that if they found the facts to be as stated in the second plea, the defendant, Nelson, was discharged.

The jury found for the plaintiff as against Woodall, but against him as to Nelson.

Plaintiff excepted to the refusal to strike the second plea, and to the above charge. The defendant, Nelson, excepted to the judgment striking the first plea. Assignments of error were made accordingly.

R. F. LYON; WHITTLE & GUSTIN, for plaintiff in error.

RUTHERFORD & RUTHERFORD; S. HALL, for defendant.

BLECKLEY, Judge.

1. If the renewal note was incomplete for lack of the signature of one of the sureties who had signed the former note, and the creditor accepted it, knowing it to be incomplete, it would not be binding upon the surety who signed it. But if the latter signed and delivered the note to the principal, with no understanding, express or implied, that it was to be signed by the former co-surety; or if there was such an understanding, and the principal, in violation of it, delivered the note to the creditor, and the creditor took it and surrendered the old note, without any notice that the principal was acting in breach of his instructions or of his duty, then, the creditor, having been wholly innocent in the transaction, would be entitled to stand on the renewal note as a complete and binding contract between the makers of that note and himself: See the case cited in 1 Central Law Journal, 560; compare, also, 6 *Georgia Reports*, 202; 8 *Ibid.*, 559; 10 *Ibid.*, 414; 11 *Ibid.*, 286; 13 *Ibid.*, 61; 17 *Ibid.*, 111. The surety who signed the note cannot protect himself against the consequences of a delivery by his principal, without taking both steps; he must show that the instrument was incomplete, and that the creditor

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knew it. Both points should be distinctly alleged in the plea, so as to be issuable. Neither of them should be presented argumentatively only. They can both be directly pleaded, if they are true; and if only one of them, or if neither of them, be true, no amount of indirect, argumentative pleading can avail.

2, 3. The note mentioned no particular medium of payment. It was a note for money. The original debt was not a Confederate debt. The creditor was a guardian, and, as to him, the fund was a trust fund. He was under no obligation, legal or moral, to accept payment in depreciated currency, such as Confederate treasury notes, unless he had thought it was for the benefit of his ward to do so. It was his right to reject such currency when offered by the principal debtor in payment. He did not, thereby, discharge the surety. A different result, in that respect, would probably have followed the rejection of an offer to pay in actual money: See 2 Paige, 497; 46 Vt., 258; 25 Mich., 351; 35 Md., 262; 9 Gill, 284; 56 N. Y., 348. The creditor's promise not to call for payment until after the close of the war, was without consideration. It was a naked promise, made to get clear of making an absolute refusal of the Confederate currency. The odium, perhaps the danger, of such a refusal may have been calculated to injure him; but if so, his debtor had no right to raise the peril, and then grant exemption from it at the ward's expense. The debtor knew he was dealing with a guardian, and not with a creditor who had a right to consult his personal advantage.

4. The promise itself did not discharge the surety, nor did the keeping of it discharge him, although the principal became insolvent. There being no consideration or valid contract between the parties, the forbearance was mere indulgence. The creditor might have brought suit at any time. He did not tie his hands. And there was no legal benefit resulting to him. Not even was there a new point established for the statute of limitations to commence running, as there was said to be in the case reported in 27 *Georgia Reports*,

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564. When the present case arose, the Code, section 2934, was in force; and the promise with which we are now dealing was oral. It was a complete nullity: 33 *Georgia Reports*, 173.

Judgment reversed.

JESSE McLENDON, plaintiff in error, *vs.* WILSON, CALLAWAY & COMPANY, defendants in error.

(BLECKLEY, Judge, having been of counsel, did not preside in this case.)

1. Where a settlement was made on the basis of an abstract of account taken from plaintiffs' books, and not by reference to the books themselves, there was no error in allowing one of the plaintiffs to testify that such abstract was correct.
2. There was no error in allowing one of the plaintiffs, who conducted the negotiations with defendant, to testify that the drafts were given in final settlement of the account between the parties so far as he knew, defendant having stated that he signed the drafts with the understanding that any errors in the account should be subsequently corrected.
3. Where the drafts were drawn by the defendant upon the plaintiffs, and acceptance was therein waived, parol testimony was admissible to show the circumstances attending the making of the same, and the reasons for such waiver.
4. Evidence that defendant stated his intention not to pay the drafts shortly after signing them, and in the absence of the plaintiffs, was properly rejected.
5. Where, to an action on such drafts, previous payments of usury were pleaded as a set off, it was not error to charge the jury that such set-off should be allowed if pleaded within four years from date of last payment.

Evidence. Negotiable instruments. Interest and usury. Statute of limitations. Before Judge BUCHANAN. Troup Superior Court. November Term, 1875.

The following, taken in connection with the decision, sufficiently reports this case:

McLendon purchased cotton and shipped it to Wilson, Callaway & Company to be sold; the latter advanced money to him for that purpose. Defendant shipped consignments of cotton to plaintiffs, some of which were not sold immediately.

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The evidence was conflicting as to whether any instructions were given by defendant in regard to its sale, and whether he was injured by the delay in selling. Two members of plaintiff's firm, Wilson and Orme, went to defendant's house to effect a settlement with him, and the drafts sued on were then given.

Defendant filed a plea on March 4th, 1869, wherein he alleged various overcharges and errors in the account on which the drafts were founded, and that it was understood between the parties, at the time of signing the drafts, that any error in said account should be corrected. The plea also alleged that "in another transaction with said firm, in account rendered, there are manifest errors of interest overcharged."

An amended plea was filed November 21st, 1872, in which it was alleged that plaintiffs had advanced to defendant \$15,000 00 ; that he had placed in the hands of Orme, on November 27th, 1867, \$17,700 00 worth of stock in the Atlanta and West Point Railroad Company, which was to be sold and the proceeds placed to his credit, so as to prevent interest from accumulating against him ; that plaintiffs had held said stock till it depreciated in value, before selling it, and that the plaintiffs caused him to pay interest at the rate of one and a half per cent. per month. A statement of these payments was made, (the last being dated May 7th, 1868,) and a set-off was claimed therefor, amounting to \$1,750 00.

On the trial, defendant testified, substantially, as follows : The payments of usurious interest were as alleged in his plea ; also the errors in the account of plaintiffs. Wilson and Orme came to defendant's house to effect a settlement ; defendant refused to settle, alleging errors in the charges ; they went over a number of accounts, most of the time in defendant's presence. All three started to defendant's office ; on the road he and Orme walked together, Wilson walking ahead ; Orme urged him to sign the drafts, and stated that any errors in the account should be corrected afterwards ; with this understanding defendant agreed to do as requested. Arrived at the office, he told Wilson that he would sign the drafts, and did so.

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Did not examine them carefully ; supposed they were in the usual form.

Defendant offered to prove by John S. Johnson that soon after he had signed the drafts, he stated that he had signed them because Orme promised that any errors should be corrected ; that the account was outrageous, and he did not intend to pay it. This evidence was rejected.

R. T. Wilson testified, in brief, as follows : Conducted the settlement with defendant. Hearing that the latter was dissatisfied with the account, went to his house in company with Mr. Orme, another member of plaintiffs' firm. Stated to him that they had come to effect a settlement. He replied that the charges were excessive. Witness, thereupon, proposed to examine the account, item by item, and promised to correct any error which defendant should point out. They made a thorough examination of the account ; at the close of it defendant expressed himself satisfied, and agreed to sign the drafts. They afterwards went to defendant's office, he and Orme walking a little behind witness, and the drafts were there signed. Knows nothing of any agreement to correct errors afterwards. Excepting a transaction between Orme and McLendon, which had already been settled by those parties, the drafts were given in full settlement of all accounts between plaintiffs' firm and defendant, so far as witness knows. [Objected to by the defendant.] The abstract of accounts from the books of plaintiffs, which was used in the settlement, was correct. [Objected to by defendant.] Acceptance was waived in the drafts at the special instance of witness. The object of the waiver was that witness wished to discount the drafts at bank, and make defendant primarily liable thereon, as drawer, instead of plaintiffs, as acceptors ; and further, that witness believed defendant would use greater diligence in paying them if he were first liable. [Objected to by defendant.]

W. P. Orme testified that he loaned defendant \$15,000 00 on behalf of the firm ; that defendant gave notes therefor, and placed in the hands of witness certain railroad stock to be sold and the proceeds applied to the debt ; that stock was

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declining, and at defendant's request it was not sold and his notes were renewed. Finally it was sold and credit given him therefor ; there is a balance of \$311 00 due defendant on the transaction. Denies agreeing to correct errors after drafts should be signed.

The jury found for the plaintiffs \$4,370 57. Defendant moved for a new trial on the following, among other grounds :

- 1st. The rulings as to the evidence stated above.
- 2d. Because the court charged, among other things, that if the defendant made payments of usurious interest, he is entitled to set-off the usury against the plaintiffs' claim, provided that it was pleaded within four years from the date of the last of such payments.

The motion was overruled, and defendant excepted.

BIGHAM & WHITAKER, for plaintiff in error.

FERRELL, HAMMOND & BROTHER, for defendants.

WARNRR, Chief Justice.

The plaintiffs brought their action against the defendant on two drafts, dated 31st of August, 1867, for \$3,819 24, each, one due at ninety days, and the other at sixty days, drawn by defendant on plaintiffs, payable to their order, acceptance waived. To this action the defendant pleaded several pleas, as set forth in the record, in one of which the defendant alleged that the plaintiffs were indebted to him the sum of \$1,750 00, for usurious interest received. On the trial of the case, the jury, under the charge of the court, found a verdict for the plaintiffs for the sum of \$4,370 57—reducing the amount claimed to be due on the two drafts \$3,267 91. The defendant made a motion for a new trial, on the various grounds therein set forth, which was overruled by the court, and the defendant excepted.

It appears from the evidence in the record, that the two drafts sued on were given in liquidation of an account held by the plaintiffs against the defendant, and one of the main ques-

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tions on the trial, was whether, at the time the drafts were signed, the defendant insisted that the amount of the account was wrong, and that plaintiffs agreed that if there was anything wrong in the account it should be corrected, and, upon that representation, the defendant signed the drafts. The evidence upon this point in the case was conflicting.

1. There was no error in admitting the answer of Wilson in evidence, that the account for which the drafts were given was a true extract from the books of the plaintiffs. The items of the account were stated in the abstract, and it was for the account thus stated that the drafts were given, and not for the items on the books of plaintiffs, unless the abstract and the books contained the same items, as stated by the witness. If the defendant had desired to have seen the plaintiffs' books, for the purpose of verifying the items in the abstract, before giving the drafts, he could have done so, or have relied on the abstract as he did do, and for which the witness stated the drafts were given.

2. There was no error in allowing the witness, Wilson, to testify that the giving of the drafts was in full settlement of all matters between plaintiffs and defendant, and was satisfactory to all parties, so far as he knew or believed, the court rejecting the word "believed," so as to make the testimony read so far as he knew; especially was this testimony admissible, in view of and in reply to the evidence of the defendant.

3. There was no error in allowing the witness, Wilson, to give his reasons why acceptance of the drafts was waived, or his other testimony, objected to by the defendant, as contained in the bill of exceptions, in view of and in reply to the testimony of the defendant in relation to the transactions between the parties.

4. There was no error in ruling out the testimony of Johnson, as to what the defendant told him shortly after the drafts were executed, in the absence of the plaintiffs, that he did not intend to pay them, etc. A party cannot manufacture evidence for himself in that way.

5. When this case was before this court on a former occa-

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sion, and which is reported in the 52d volume of *Georgia Reports*, 41, a new trial was ordered for error in the charge of the court, in excluding from the consideration of the jury the evidence of the defendant as to the intention and understanding of the parties, that the amount which he claimed to be erroneous, for which the drafts were given, should *thereafter* be corrected. In looking through the charge of the court at the last trial of the case, in view of the rulings of this court, the questions in issue between the parties, including the question as to the bar of the statute, as to the claim for usury, were fairly submitted to the jury, under the law applicable thereto, and there was no error in the charge of the court as given, or in the refusal to charge as requested. There is sufficient evidence in the record to sustain the verdict, although that evidence was conflicting. The credibility of the witnesses, and the weight to which their testimony was entitled, was a question for the jury exclusively, and not a question for this court to decide. Whilst we have no power to compel parties to be *satisfied* with the verdict of a jury of their neighbors, upon questions of fact, when there is conflicting evidence as to their rights, and no rule of law violated by the court, still we have the power to compel them to *acquiesce* in such verdicts, and not disturb the country with any further litigation, as we now do, by affirming the judgment of the court below in this case, in overruling the defendant's motion for a new trial.

Judgment affirmed.

P. H. LAREY, plaintiff in error, *vs.* CHARLES TALIAFERRO, defendant in error.

1. When one, in trading property, says he will warrant it to be sound in every respect, his declaration may amount to a representation as well as to a warranty.
2. An express warranty, knowingly false, may be waived as a contract, and an action brought for the deceit: *6 Georgia Reports, 584.*

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3. One who knowingly trades property afflicted with a contagious disease, is not entitled to any notice, when the existence of the disease is afterwards discovered by the purchaser. What is already known need not be communicated.
4. Inaccuracies in charging the jury are immaterial, when the verdict is fully supported by the evidence.

Sales. Warranty. Deceit. Notice. New trial. Before Judge UNDERWOOD. Floyd Superior Court. January Term, 1876.

Taliaferro brought complaint against Larey, alleging, in brief, as follows :

On February 1st, 1871, the plaintiff exchanged with defendant a horse for a mule. The horse was worth \$125 00. The defendant, knowing the mule to be unsound, falsely and fraudulently stated to the contrary. This statement was made for the purpose of inducing the plaintiff to make the trade. The defendant knew, at the time, that the mule had the glanders, an incurable and contagious disease, of which he subsequently died. Other stock of the plaintiff contracted said disease from the mule and died, to his damage \$300 00.

The defendant pleaded the general issue.

The evidence fully sustained the plaintiff's case as made in his declaration, except as to the amount of his damages. The horse which he exchanged to defendant was shown to have been worth \$100 00. Two of his mules contracted the disease and died, worth \$200 00. He discovered that the mule had the glanders, on the day after the trade, though it did not die until the following November. Plaintiff said nothing to the defendant about the mule being diseased until some time in the summer. He was taken sick about a month after the trade and could not go to see defendant any sooner. When he recovered sufficiently, he went twice to see defendant but could not find him at home.

The jury found for the plaintiff \$300 00. The defendant moved for a new trial upon the following, among other grounds :

1st. Because the court refused to charge, without qualifica-

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tion, as follows: "Before you can find for the plaintiff, it must be proved to you that the defendant made to plaintiff, at the time of the trade, some representations about the mule which were false, and that plaintiff acted on these representations, and that he has been damaged by reason of these false representations." The court added as follows: "That is correct, if the suit was on the warranty. This is an action of deceit, and every one, when he sells property, warrants that it is reasonably suited to the use intended, and that the seller does not know of any latent defect."

2d. Because the court refused to charge the jury, without qualification, as follows: "If defendant simply warranted the mule, plaintiff cannot recover in this form of action, this being a suit for deceitful and fraudulent representations, and not a suit for breach of warranty." This request the court qualified as follows; "This being an action for deceit and fraud, the recovery, if any, must be for the deceit and fraud *on the warranty which the law implies.*" (?) (Exact copy both from record and bill of exceptions. R.)

3d. Because the court refused to charge, without qualification, as follows: "If plaintiff discovered that the mule was diseased the next day after the trade, it was his duty to have notified defendant of the fact within a reasonable time." To which the court added as follows: "But if he was taken sick shortly after, and went to see defendant about the matter several times, and could not find him at home, you will consider that in coming to a conclusion."

The motion was overruled, and the defendant excepted.

DABNEY & FOUCHE, for plaintiff in error.

ALEXANDER & WRIGHT; FORSYTH & REESE, for defendant.

BLECKLEY, Judge.

1. While we do not agree with the circuit judge in the view he took of the case, we do not feel constrained to order

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a new trial. There is positive evidence that the defendant below said, at the time of the swap, that he would warrant the mule to be sound in every respect. That declaration was, doubtless, intended as a representation, and was understood to be such by the other party. That it amounted to a warranty, would not strip it of its character as a representation.

2. An express warranty may be waived as a contract, and an action maintained upon the same general transaction as fraud and deceit. To do this, the warranty must have been made with knowledge by the warrantor that it was false, and must have been accepted by the warrantee without such knowledge on his part. We think that these conditions, and others requisite to a recovery, are established with reasonable certainty by the evidence in the record.

3. The request to charge on the subject of giving notice, should have been refused altogether. Without the party trading the mule knew it was afflicted with the disease, he was guilty of no deceit; and if he did know it, he was not entitled to be informed after the other party found it out. That the latter, when he found it out, was bound to use due diligence to keep the disease from spreading to his other stock, or else take the consequences of all subsequent injury to them, there can be no doubt; but it does not appear but what the court charged the law on that subject fully and correctly.

4. The verdict is so well warranted by the evidence, that we cannot do otherwise than regard as immaterial such inaccuracies as we have discovered in the charge of the court.

Judgment affirmed.

T. P. PLEASE, plaintiff in error, *vs.* DIBBLE & BUNCE, defendants in error.

Where a defendant in execution placed a claim in the hands of plaintiffs' attorney with instructions to collect the same and to apply it to the *f. fa.* against him, and said attorney collected the claim but failed to apply it as

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directed, the plaintiffs are not bound to recognize such collection as a payment to them. As to the said claim, the attorney represented the defendant in *fa.*, and not the plaintiffs.

Judgments. Attorney and client. New trial. Before Judge TOMPKINS. McIntosh Superior Court. November Term, 1875.

The following, taken in connection with the decision, sufficiently reports this case :

Defendant moved for a new trial on the following, among other grounds :

1st. Because the jury found contrary to that part of the charge which stated that payment to an attorney is payment to his client.

2d. Because of the newly discovered evidence of J. W. Fan-nin, who would testify that he had been consulted by defendant in regard to the case at bar ; that he afterwards met Bacon, and spoke to him about it, and that the latter intimated that defendant's claim of payment was correct.

W. U. GARRARD ; W. A. WAY, for plaintiff in error.

R. E. LESTER ; W. R. GIGNILLIAT, for defendants.

WARNER, Chief Justice.

This case came before the court below on a *scire facias* to revive a judgment. The defendant pleaded that the judgment had been paid, and on the trial of that issue, the jury, under the charge of the court, found a verdict in favor of the plaintiffs. The defendant made a motion for a new trial on the several grounds therein set forth, which was overruled by the court, and the defendant excepted.

The evidence in the record, as to the payment of the judgment, was conflicting, and the charge of the court was quite as favorable to the defendant as he was entitled to under the evidence. It appears from the defendant's own testimony, that whilst the plaintiffs' claim was in the hands of Bacon, as their attorney, for collection, that he also placed in Bacon's

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hands a claim of his own, against another person, and instructed him to collect the same and apply it to the payment of the plaintiffs' judgment, which he agreed to do; that he collected the money and failed to apply it as instructed. So far as the collection of the claim placed in Bacon's hands by the defendant, with instructions as to the application of the proceeds thereof, when collected, was concerned, Bacon was the attorney of the defendant, and not the attorney of the plaintiffs, and it does not appear that they had any knowledge of the transaction between Bacon and the defendant whatever. If Bacon has collected money for the defendant on claims placed in his hands, and has failed to apply the same, as instructed, or to properly account therefor, then he must proceed against Mr. Bacon, and not charge the plaintiffs with it, who had nothing to do with that matter, so far as it appears from the evidence in the record before us.

There was nothing in the motion for a new trial, on the ground of newly discovered evidence, which would have authorized the court to grant it.

Let the judgment of the court below be affirmed.

**JESSE MCLENDON, plaintiff in error, vs. FRANCIS A. FROST,
defendant in error.**

1. Refusal, on oral demurrer or motion, to strike a part of the plaintiff's cause of action as barred by the statute of limitations, is no cause for new trial, where the statute is pleaded, and where the charge of the court and the verdict of the jury are with the plea. No harm is done.
2. After the parties have announced ready for trial, it is too late for one of them to move for the appointment of an auditor, without showing some good excuse for not making the motion earlier. In this case the excuse shown was not sufficient.
3. When the plaintiff amends his declaration, the court is not obliged to put him upon terms, or to exact the payment of costs.
(a) When the examination of a witness is apparently more minute than necessary, the court may inquire of counsel why the examination should proceed in that way; and, in doing so, may state what is admitted by the party, and what appears upon the face of certain writings to which the examination relates.

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- (b) When accounts are in evidence, and they are pertinent otherwise than as mere memoranda used by the witnesses to refresh their memory, it is not error to refuse to rule them out except as such memoranda. They should stay in, if at all, for all purposes which they may legally subserve.
- (c) When the suit is on notes and a set-off is pleaded, the plaintiff may show he has paid the debt claimed in the set-off; and the judge may state this rule of law in the hearing of the jury.
- (d) The court should not remark in the hearing of the jury that evidence had been admitted *ex gratia*, rather than by the strict rules of law; but so doing is not *necessarily* cause for new trial, the remark not being addressed to the jury, nor amounting to an intimation of opinion as to what had or had not been proved.
4. When, on the third day of the trial, a motion is made for continuance, two hours and a half is not too short a time to allow for completing the showing.
- (a) Refusing the continuance, was not error.
- (b) The second refusal to refer to an auditor was not error.
5. When there is positive evidence of a fact, the admission of cumulative evidence, even if it be not strictly legal, is not generally cause for new trial.
6. Evidence that no goods were sold without authority, written or verbal, from the party, is pertinent, when the items are numerous, and when some of them are supported by written orders and others not.
7. The defendant's sworn plea may, in argument, be commented on as a sworn statement, and may be compared with his testimony to disparage it.
8. When, at ten o'clock at night, there is a tired juror, the court and the counsel may confer in his presence and hearing, on the question of adjourning until the next day, and speak of the length of time that will be needed, and which can be allowed for concluding the trial, and of the opportunity for condensing which the adjournment will afford. And it is not error for the court to adjourn when counsel consent, and when the arrangement agreed upon, as to time, is satisfactory to all concerned.
9. When usury is in question and the plaintiff's counsel, during the trial, offers to take ten per cent., it is not error for the judge to inquire of the defendant's counsel if that rate is satisfactory.
10. When argument is properly interrupted to correct an erroneous statement of fact, and a paper not at hand is needed to settle the point in dispute, time to search for the paper or to establish a copy may be denied. If counsel having the floor exclaim (in the way too frequently practiced) "The shoe pinches," and adverse counsel complain of it as improper, and show, by producing the lost paper, that the statement giving occasion to the interruption was, in fact, erroneous, the court may answer: "Well, you have now stated it your way; he has passed from it; let the argument go on." What is best to be done or said, under such circumstances, must, in the nature of things, be subject to discretion.
11. A sworn plea is an admission, by the party, of the matter of fact which it asserts; and when his testimony, as given in on the trial, conflicts

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- with it, the circumstance may be remarked upon to the jury, in argument, as affecting his credit.
12. When the whole charge of the court is excepted to, the exception will not be sustained unless the whole charge is wrong. If the object be to reach defects or imperfections in particular parts, they must be pointed out.
 13. The creditor, in applying a payment not applied by the debtor, may credit it on a just and valid demand, whether the correctness of such demand be assented to by the debtor or not.
 - (a) To deprive the creditor of a right to apply certain payments, because "it was the known reasonable expectation or understanding that a settlement would afterwards take place, at which time the credits would be placed, and not till then," such a theory must distinctly appear in the evidence.
 14. After the creditor has exercised his legal right of applying payments, the jury will not apply them differently.
 15. Where the evidence makes a case of sales wholly on the authority, written or verbal, of the defendant, and wholly on his credit, from first to last, he is an original debtor, and the law of promise to answer for the debt, default or miscarriage of another, is not applicable.
 16. Where payments have been applied and bills rendered, showing both debits and credits, the debtor may acquiesce, and be bound by his acquiescence, even though he did not previously fully know, understand and assent to each account.
 17. When the court has properly refused a request to charge, a second request, substantially the same as the former, should be refused also.
 18. That a debt was just and that payments were rightfully applied to it, may appear without showing all the particular items of merchandise sold and delivered.
 - (a) It is the better practice not to read aloud to the jury a request to charge which the court intends to refuse.
 19. This court has not been made to know that the verdict was contrary to the charge of the court touching bank account and interest, or contrary to law or equity, or excessive in amount, or contrary to evidence.
 20. There was no error in the arrangement made for receiving the verdict, or in receiving it with a judge on the bench who did not preside at the trial, or in requiring the jury to separate principal and interest.
 21. No material error appears to have been committed as to matters not specifically noticed above.

New trial. Auditor. Practice in the Superior Court. Amendment. Witness. Evidence. Continuance. Pleadings. Jury. Usury. Admissions. Charge of court. Practice in the Supreme Court. Appropriation of payments. Debtor and creditor. Before Judge CRAWFORD. Troup Superior Court. November Term, 1875.

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On April 27th, 1875, Frost brought complaint against McLendon on the following obligations:

Due-bill for \$1,000 00, dated September 30th, 1865.

Due-bill for \$654 61, dated May 26th, 1870, with credits thereon amounting to \$178 60.

Promissory note, dated April 26th, 1873, due one day after date, for \$638 82, with credit thereon of \$200 00.

Promissory note, dated December 16th, 1871, due at one year, for \$1,576 25.

The defendant pleaded the statute of limitations as against the first due-bill, the general issue, payment and set-off, as against the other obligations.

After both parties had announced ready, the defendant moved to refer the case to an auditor, as it involved long and complicated accounts which could not well be passed upon by a jury. The court overruled the motion, holding that it should have been made at the first term, or in vacation, in time for the auditor to have examined and reported; that to allow the motion then would be to delay the plaintiff for six months. To this ruling the defendant excepted.

The defendant then demurred to the plaintiff's declaration, so far as it was based upon the first due-bill above set forth, upon the ground that suit thereon was barred by the statute of limitations. This defense was also set up by plea, and was sustained by the charge of the court and the verdict of the jury. The motion was overruled, and the defendant excepted.

When the plaintiff offered in evidence the two notes, defendant objected to the same upon the ground, it is inferred, that there was a variance between the notes as declared upon and as tendered. On the second due-bill above set forth, when tendered, the credits appeared to be \$198 40. This objection resulted in the plaintiff's being compelled to amend his declaration. Defendant then asked that the plaintiff be required to pay the costs, and it is inferred that the request was also made that he be required to consent to a continuance. These requests the court refused, stating that if defendant desired a

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continuance he could show how he was less prepared for trial by reason of the amendment. To this ruling defendant excepted.

Defendant relied upon certain cotton which he had delivered to plaintiff at various times, some on sales to him and some to be sold, and the proceeds applied to his indebtedness to plaintiff. When he was upon the stand as a witness, counsel for plaintiff was examining him minutely as to each cotton bill, when the court inquired of counsel as to the necessity of such an extended examination, when defendant admitted, and the bills showed, that the various lots of cotton inquired about had been credited to the account of defendant. The court simply stated what was admitted, and what the cotton bills showed on their face. To this remark the defendant excepted.

Whilst a witness by the name of Forbes was testifying that he had been the clerk of plaintiff, and had exhibited the various accounts for cotton sold to plaintiff by defendant, and also showing various charges against defendant, to defendant, and he had expressed himself satisfied therewith, counsel for plaintiff asked the court if these various accounts were in evidence. The court stated that they had been presented by defendant, and that he had been examined as to their correctness at great length, and that they were so "presented, considered and examined" without any objection; that hence they had been allowed and considered in evidence. The defendant then moved to rule out the said accounts for all purposes except as memoranda from which the witnesses refreshed their minds in testifying. This motion the court overruled, and the defendant excepted.

In making the aforesaid ruling the court stated that if the plaintiff sued on notes and defendant pleaded as set-off a counter-claim of a larger amount, the plaintiff could show that he had paid such demand. That defendant had been allowed, *ex gratia*, rather than by the strict rules of law, to show that said claims (supposed to refer to accounts in favor

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of plaintiff) were incorrect and erroneous. To these remarks the defendant excepted.*

On the third day of the trial, the defendant moved for a continuance upon the ground that the case had taken a direction not anticipated by him, in this, that he had supposed the only issues to be whether defendant was indebted to the plaintiff or the plaintiff to the defendant, on the notes sued on and the counter-claims pleaded; that it now appeared that plaintiff's books showed that these counter-claims had been paid, or that the defendant had already received credit for the amounts thereof, if such books spoke the truth, and it became necessary to attack the correctness of such books, thus changing materially the issue, rendering a lengthy investigation of accounts necessary, and the production of testimony not then at hand. The court allowed the defendant two hours and a half in which to prepare the showing. To the time allowed defendant excepted.

The motion to continue was overruled, and the defendant excepted.

The defendant then again moved to refer the case to an auditor. The motion was refused, and the defendant excepted.

The plaintiff offered in evidence a receipt of Callaway & Whitfield, showing payment to them by plaintiff of \$75 00 on account of defendant. Also, an agreement between defendant and one Culbertson as to the disposition of certain cotton therein referred to, which was in possession of plaintiff, and against which certain legal proceedings had been instituted. On the back of this agreement was an entry to the effect that the proceeds of such cotton, amounting to \$381 50, had been paid to defendant, signed "Thomas Davis, L. C." It was objected that these papers did not show that the defendant ever received the moneys therein referred to. As there was other positive evidence to the effect that the defendant received the benefit of these moneys, the court overruled the objection.

* The bill of exceptions and record are so obscure on this branch of the case, that the reporter is unable to give a clearer statement of the facts on which the ruling was based.

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Many of the charges in plaintiff's account against defendant were based on sales made to the tenants of the latter. The defendant denied the right of plaintiff to charge such goods to him. The plaintiff showed by his clerks that he never sold any goods to defendant or his tenants, without defendant's authority, either written or verbal. To this evidence the defendant objected. The objection was overruled, and the defendant excepted.

The court allowed counsel for plaintiff to compare, in argument, the statements in defendant's plea, which was sworn to, with his testimony, to the disparagement of the latter. To this the defendant objected.

At the conclusion of the opening argument for the plaintiff, at about ten o'clock, P. M., one of the jury complained of being tired. The court said that they must go through that night if possible, and (addressing counsel) "we have four hours to go on until two o'clock, but I have no right to ask counsel to agree." Plaintiff's counsel said he thought he would not take more than one hour. The court said that if defendant's counsel would not take more than three hours, it would be able to adjourn over to next day. Defendant's counsel said he did not think he would consume that much time; that, with preparation, he could condense. The court replied that if by adjournment he could condense what he had to say, it would adjourn and give him the time. Counsel said he could do so, and consented to the adjournment. To all of this, happening in the presence of the jury, the defendant excepted.

In the argument of counsel for plaintiff, he stated that plaintiff would be satisfied with interest at ten per cent. on the note for \$1,576 28. This note bore interest on its face at one per cent. per month. The court asked counsel for defendant if that was satisfactory to him? To this defendant's counsel replied by reading his plea of usury. To all of which the defendant excepted.

Counsel for plaintiff took up certain cotton bills, marked paid, and stated that defendant had pleaded them and wished

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to recover on them. Defendant's counsel, addressing the court, stated that they were not in the amended plea, and that defendant claimed no recovery for the cotton therein mentioned, but that defendant did plead and seek to recover on several other bills for cotton. Counsel for plaintiff still insisted that the cotton bills marked paid were pleaded, and the plea being temporarily lost, counsel for defendant asked for time to find it or to establish a copy. The court directed the argument to proceed. Plaintiff's counsel then said: "the shoe pinches," and "when you pinch him he shows it." To this counsel for defendant objected. The court stated that the plea would settle it, but the case must go on. Afterwards the plea was found, and defendant's counsel asked to make the correction, with such document and the cotton bills pleaded, in his hand. The court replied: "Well, you have now stated it your way. He has passed from it. Let the argument go on." To all of which the defendant excepted.

Plaintiff's counsel read the plea, and argued that it conflicted with defendant's testimony. Defendant's counsel objected to the plea's being treated in the light of evidence. The court stated that the plea was not evidence, but could be commented on as any other admission. To this defendant excepted.

The defendant requested the court to charge the jury, without qualification, as follows: "It is the duty of the jury first to ascertain what amount, if anything, defendant owed plaintiff when this suit was brought, for which plaintiff has sued in this action, having reference to the pleadings to ascertain what is included in the action. Then to ascertain what amounts of money and the value of what property the evidence may show he has delivered to plaintiff. If it appears from the evidence that no directions were given by him at the time of such deliveries, and they believe the defendant knew fully of the accounts, and had assented to them as correct at the time of the credits, then, to the extent that said accounts may have been proven to be correct, credits on the accounts should be allowed to the amount of the same shown to be correct." This the court charged with the following

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qualification : "It is immaterial whether the defendant assented to their correctness or not, if the jury believe that there was a valid subsisting demand against the defendant, which was due to the plaintiff, and upon which the credit was given to him, but they must be satisfied of that."

The defendant excepted to the qualification attached to this request.

The defendant requested the court to charge as follows: "If directions were given to such funds, or any part thereof, inconsistent with such credits; or if the evidence shows it was the known, reasonable expectation or understanding that a settlement would afterwards take place, at which time the credits would be placed, and not till then, it should now be ascertained what he does fairly and legally owe the plaintiff, and the application of the money be made accordingly, and whichever way the balance falls the jury should so find." This charge the court refused upon the ground that there was no testimony on which to predicate it. To this the defendant excepted.

The defendant requested the court to charge the jury as follows: "If the jury should believe from the evidence, that it was known to the plaintiff, that it was the reasonable expectation of the defendant, at the time of the delivery of any money or property to him, that there would afterwards be a settlement between them of matters of mutual indebtedness, when he would himself direct the placing of credits, the mere fact that plaintiff had placed the credits is not conclusive, and the jury still have the right to place such amounts as they may find, from the evidence, defendant has so delivered, first to such amount as they may find due on the note or notes not barred by the statute of limitations. If such amount is less, then to find the balance for the plaintiff, and if it appears from the evidence to exceed the amount established by plaintiff to be due on the notes sued on, to find the balance for the defendant against the plaintiff." The court refused to charge this request, and the defendant excepted.

The defendant requested the court to charge the jury as

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follows: "A promise to answer for the debt, default or miscarriage of another, to make the obligation binding on the promisor, must be in writing, signed by the party charged therewith, or by some person by him lawfully authorized. Therefore, if the jury shall be of the opinion, from the evidence, that there are any charges in the accounts of plaintiff for the debt, default, or miscarriage of any other person or persons, each and every such charge, whether made in general terms or itemized, should be disallowed, unless it further appears from the evidence that defendant has promised to pay it in writing, signed by himself, or by some person by him lawfully authorized." The court refused thus to charge, and the defendant excepted.

The defendant requested the court to charge the jury as follows: "Plaintiff had no legal right to pass any money, or the value of anything he may have received from defendant, to credit on accounts, and then claim it as a payment of the same to him, only so far as the amount of said accounts may be established by the proof to be correct. The burden of proof to establish this is on the plaintiff. This has special and strong application to this case, unless the jury are of the opinion, from the evidence, that before the alleged credits, each account was fully known to, and understood by, the defendant, and assented to by him as correct." The court refused thus to charge, and the defendant excepted.

The defendant again requested the court to charge substantially as set forth in the second and third requests. The court refused, and he excepted.

The defendant requested the court to charge as follows: "As to items and charges for merchandize alleged to have been sold, before any of said items or charges can be allowed, the jury must be satisfied from the evidence what specific article was sold and the price agreed upon, or else the reasonable value thereof in market. This applies both to items charged as having been bought by defendant and by others, either for themselves and passed to his account, or on his account. They should all appear from the proof to be distinctly item-

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ized, or otherwise plainly set forth and proven as charged, before any or either of the charges should be allowed by the jury." This request the court read over in the presence of the jury and refused to charge the same. Instead thereof it charged as follows: "Before the jury should find for the plaintiff on the notes sued, they should be satisfied that he had other legal and just demands against the defendant, sufficient to cover the amount of the defendant's payments to him, and that he had applied such payments to these demands. If, however, it does not appear from the proof that he did have such demands, then the application to an unjust demand would not discharge the plaintiff from his liability to account to defendant for payments made."

The defendant excepted to the refusal to charge, to the reading of the request in the presence of the jury, and to the charge as given.

It is deemed unnecessary to set forth either the charge of the court or the evidence.

The jury found for the plaintiff \$2,140 08 principal, and \$535 01 interest.

The defendant moved for a new trial upon each of the grounds of exception above set forth, because the charge was erroneous; because the verdict was contrary to the charge, the law, and the evidence, and because the court erred in the following matters: After Judge Crawford had closed his charge and the jury had retired, the said judge stated that he would leave on the train for Columbus, which was expected soon to pass, and asked counsel, if the jury should not agree before his departure, if they would consent for them to return a verdict to the clerk, subject to formal correction. To this counsel agreed. After the departure of Judge Crawford, and whilst Judge Buchanan was presiding, the jury returned a verdict finding a gross sum for the plaintiff. The jury stated to the court that the finding embraced principal and interest. The court instructed them that the principal and interest should be separated. They retired, and returned with the verdict as above set forth.

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The defendant insists that the return of the verdict, after the departure of Judge Crawford, and the alteration of the same under instructions from Judge Buchanan, constitute good ground for new trial.

The motion was overruled, and defendant excepted.

BIGHAM & WHITAKER, for plaintiff in error.

FERRELL & LONGLEY; N. J. HAMMOND; A. H. Cox, for defendant.

BLECKLEY, Judge.

The decision, as delivered from the bench, is set out in the twenty-one head-notes. These notes were carefully considered, and are so full that they speak all we can usefully say touching the case or any part of it.

Judgment affirmed.

WILLIAM LAKE, trustee, plaintiff in error, *vs.* JOHN H. HARDEE *et al.*, defendants in error.

1. Whilst the chancellor may direct the jury to find a special verdict in equity trials, and may direct their attention to particular points of inquiry by written questions, yet those questions should present the main issue clearly and fully to the jury, so that their verdict shall unmistakably speak the exact amount due from the defendant to the complainants.
2. If that amount be not set out in the finding of the jury so certainly that the decree may follow the verdict, and the two harmonize, the verdict must be set aside and a new trial must be granted.
3. Where the jury find two sums differing from each other in amount, in response to two of the questions, and it is doubtful whether they intended to charge the defendant with the aggregate of the two sums, or with only one of the two, and in that event, which of the two, the verdict is too uncertain for a valid decree to be entered upon it; and if the chancellor elect one of the sums found and decree accordingly, he becomes the tribunal to determine the amount of defendant's indebtedness, and not the jury, and the decree is improper; and this applies too, to the mode of counting interest, whether it shall be compounded or not, and hence what its sum shall be.

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4. Where a bill states that the defendant was in possession of certain property of the complainants, as heirs-at-law of their grandfather, who died in South Carolina, and that he removed the property to Georgia, and recognized the relation of trustee in this state; and where on the trial the facts make a different case, and show that the complainants, by the will of their grandfather, took one-fourth of an estate left by him to their father, who died before the grandfather, and that by the statutes of South Carolina the legacy did not lapse, and that the defendant was the only qualified executor of the grandfather's estate, and had made a division thereof into four shares, three of which were turned over to the surviving children of the grandfather, the wife of defendant being one of them, and one retained to await the decision on a certain bill in equity filed by defendant, as executor, in Beaufort county, South Carolina, to ascertain, among other things, whether said legacy had lapsed by the death of the father of the complainants; and that the records were burnt during the war, and the original papers all destroyed, and the case in South Carolina not yet determined, and no effort had been made by the executor to prosecute the bill there, by the establishment of lost papers or otherwise; and where it further appeared that the executor had moved all the assets, which constituted the share of complainants, to Georgia, before the war, and had sold some of the slaves for good money and had hired out others, and had received and used the proceeds thereof, as well as the proceeds of their share of the lands and perishable property sold in South Carolina, and had repeatedly expressed the wish that the estate was settled up, but had wholly refused to account to complainants, who were minors when the proceedings in South Carolina were pending, and yet acknowledged and admitted the reception of the property and its removal to Georgia, and some indebtedness to complainants:

Held, that the bill should have been amended so as to charge the defendant as executor, and to set out the substantial facts as proven, before a recovery could be had thereon. The *allegata* and *probata* should, in some sort at least, conform to each other.

5. The facts proven make a strong case in favor of the complainants, and as the executor has moved the property to which these complainants were entitled, into this state, and converted and used it here, and has wholly failed to prosecute the bill he had filed in South Carolina, or institute any other proceedings to settle up the estate there, he is responsible to the courts of Georgia, and relief will be decreed against him here on the bill properly amended to conform to the facts.
6. If complainants, or any of them, had no guardian lawfully appointed before the year 1865 who could sue in their behalf, the right of action did not accrue to such of them prior to that year, and the limitation act of 1869 will not bar them.
7. If the executor had himself filed a bill against these complainants, which was pending in the courts of South Carolina until after 1865, to settle up this estate and account to these complainants for whatever should be de-

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creed them, the right of action in Georgia did not accrue until after 1865, whether complainants were or were not of age, and the act of 1869 does not bar any of them.

8. If neither of the above statements be true, and the right of action did accrue before 1865, then these complainants are still not barred if this executor and trustee acted fraudulently and corruptly; but whether he so acted or not is a question for the jury, and those words in the act of 1869 mean more than mere illegal conduct; they mean moral turpitude and intentional fraud, to be passed upon by the jury from all the facts of the case.
9. It follows from the above that the decree was improperly entered upon this uncertain verdict, and the judgment sustaining it is erroneous, and must also be reversed.

Equity. Verdicts. Decrees. Practice in the Superior Court. Statute of limitations. Executors and administrators. Fraud. Before Judge TOMPKINS. Chatham Superior Court. May Term, 1875.

This cause being submitted to the jury, they found as follows:

"We, the jury, find that the property of Thomas Hardee, at his death, consisted of houses, negroes and other property, as alleged in the bill, the value of which was, at the time of the appraisement, February, 1859, \$19,518 00. And the jury do find that William Lake did take possession of said property, and did receive and get possession of one-fourth of said estate at the division thereof. And the jury do find that the said William Lake has since taken possession of said one fourth of said estate, and, up to the filing of this bill, held possession of, and managed and controlled said property as trustee for the complainants. And we do further find that the said William Lake has failed and refused to account to complainants for their property, and unintentionally disregarded his duties as trustee. We do further find that said William Lake did, after possessing himself of the one-fourth part of the estate of Thomas Hardee as trustee for complainants, convert to his own use all of said property except the tract of land (one hundred and fifty acres,) bought from the estate of William Hardee by said Thomas Hardee, and did sell some of said property and convert the proceeds of the said sale to his own

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use and thereby defrauded complainants, and that he has so fraudulently and corruptly managed said estate that he has never paid over to said complainants one cent of the principal or interest due to them from him as trustee.

"We cannot find that the said William Lake did apply any of the proceeds of the trust estate to the purchase of lot number thirty-eight, Warren Ward, in the city of Savannah. We find that some of complainants have demanded a settlement from said William Lake, of said trust estate, and that he has refused and failed to settle.

"We find that the said William Lake has declared that he wished the trust estate of complainants was settled up, but do not find that he said he had sold *all* of the real and personal property of said trust estate and used it for his own benefit, but intended to pay it back.

"We find that the estate of Thomas Hardee was in debt at the time of his death, one thousand four hundred and twenty-seven dollars and eighty-two cents, (\$1,427 82,) exclusive of the bond held by Frank P. Hardee, and that the said William Lake has paid off debts to the amount of one thousand four hundred and twenty-seven dollars and eighty-two cents, (\$1,427 82,) and realized from sales of estate of Thomas Hardee one thousand three hundred dollars, (\$1,300 00.) We find that the amount of money (on the basis of gold) derived from the said trust property by the said William Lake when he took possession of it in South Carolina, in 1857, to the close of the war, by the custody, control and hire of the negroes so taken possession of by him at the time, to be three thousand eight hundred and sixty-eight dollars and forty cents, (\$3,868 40,) with interest.

"We find that the negroes Kinkie and Nannie, died natural deaths; the negro Jackson was drowned. The negroes Center and Minter were freed by the United States government, their value being, when taken, one thousand four hundred dollars, (\$1,400 00.)

"We find that part of the estate of Thomas Hardee assigned to complainants, on the 12th of February, 1859, was

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of the value of four thousand five hundred and twenty-eight dollars and fifty cents, (\$4,528 50.) And that William Lake converted to his own use four thousand two hundred and ninety-nine dollars and forty cents, (\$4,299 40,) of the same.

"THOMAS F. BUTLER, Foreman.

"Savannah, Georgia, May 29th, 1875."

Whereupon the chancellor rendered the following decree : " And it appearing that Mary Jane Hardee has died since the filing of the bill of complainants—a minor at the time of her death, and intestate—leaving the other complainants, except John H. Hardee and J. S. Guy, and Benjamin W. Hardee, her only heirs-at-law. And it further appearing that said Benjamin W. Hardee is the brother of complainants, except John H. Hardee and J. S. Guy, and is entitled to one-sixth of the amount to be recovered out of William Lake, the defendant, but said Benjamin W. Hardee is not a party to the bill of complainants, and no decree can be made as to said one-sixth interest. It is therefore adjudged, ordered and decreed that complainants do recover from William Lake, the defendant, the sum of three thousand five hundred and eighty-two dollars and eighty-three cents (\$3,582 83,) being five-sixths of \$4,299 40, the amount of complainants' trust estate which was fraudulently and corruptly converted by William Lake, the defendant, to his own use, together with interest on said \$3,582 83, from the 12th day of February, 1859, until the 12th day of February, 1865, at the rate of seven per cent. per annum ; the interest up to February 12th, 1865, amounting to \$1,504 79 ; and with interest from said 12th day of February, 1865, upon said principal and interest, the total being \$5,087 62 at the rate of six per cent. per annum, annually compounded, until the day on which said defendant, William Lake, shall satisfy and pay off this decree. This compounding of interest being allowed and decreed to complainants against the defendant by reason of the fraudulent and corrupt management of defendant with regard to complainants' trust estate, and the large amount of the hire and

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profits of said trust estate received by defendant and converted to his own use.

"And it is further ordered and adjudged and decreed, that execution do issue against the property of defendant for the recovery of said principal and interest, and when collected, that one-fifth thereof be paid to John H. Hardee and Ann M., his wife, one-fifth to Jeremiah F. Hardee, one-fifth to Edwin B. Hardee, one-fifth to J. S. Guy and Margaret S., his wife, and the remaining fifth to Abraham Hardee. It is further ordered that all costs be paid by the defendant, William Lake.

"HENRY B. TOMPKINS,

"*Judge E. F. C. Ga., as Chancellor.*"

"June 25th, 1875.

For the remaining facts, see the opinion.

HARTRIDGE & CHISHOLM; R. E. LESTER, for plaintiff in error.

R. R. RICHARDS, for defendants.

JACKSON, Judge.

Thomas Hardee died in South Carolina possessed of an estate of lands and negro slaves, about the year 1857. Lake, who married one of his daughters, qualified as executor. The complainants were children of W. W. Hardee, son of the testator, and grand-children of the testator. W. W. Hardee died before his father. The estate was divided among the legatees, but the part allotted to W. W. Hardee was put in the executor's hands to see whether the legacy lapsed on account of W. W. Hardee's death before his father's, and to be held to answer to a bond given by W. W. Hardee, and indorsed by testator, if it was liable therefor. There was some dispute whether this division was temporary or permanent. Lake sold some lands which could not be equally divided, and before the war moved the share of complainants, in money and negroes, to Savannah, Georgia, where he lived. Before the war, and about its beginning, he sold some of the slaves be-

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longing to this share of complainants' father, and about 1863 invested money in other slaves. It was in dispute whether he bought the latter for himself or for the share he thus held for complainants, in certain contingencies, but he obtained no order of any court either to sell or to buy. In 1858 or 1859 he filed a bill in South Carolina to fix the rights of the parties and to settle the estate, but it was suffered to drag along until Beaufort fell into the federal hands during the war, and the court-house was burned and the records destroyed. After the war he made no effort to prosecute the bill or establish papers, or to settle the estate, but frequently said that he wished it was settled up. He never paid complainants a cent, and made no returns. Whereupon, in 1875, they brought their bill against him, as trustee, in Chatham county, Georgia, alleging the foregoing facts, and that he had converted their property to his own use, and calling upon him for an account and settlement. Lake answered the bill, admitting substantially the relation of the parties to him and the fact of division—temporarily, he said—the removal to Georgia of the share so allotted to complainants' father's part, the sale of negroes and re-investment in negroes, not for himself, but for this share, and that they perished on his hands as the result of the war, and set up that the estate of Thomas Hardee was small and their share small, and used up in expenses, etc. He also sets up the pendency of his bill to settle the estate in Beaufort, South Carolina, and the statute of limitations of 1869. The court submitted to the jury certain questions, to which they brought in answers, but found no specific sum due to complainants, taking their responses as a whole, one answer to one question seemingly making it one amount, and the other another sum, and not fixing the amount of interest or providing that it be compounded. They also found that he had *unintentionally* disregarded his duties as trustee, and yet in another response they found that he had acted fraudulently and corruptly; and the court charged them that "if he had done anything in the management of the estate which he ought not to have done, or if he had left undone anything in his duty that he ought

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to have done," this was tantamount to acting "fraudulently and corruptly," so as to take the case out of the statute of limitations of 1869; "that it was not necessary for the jury to find that he had acted intentionally wrong or with moral turpitude." A motion for a new trial and to arrest the judgment were both made on various grounds; but we shall consider them only in the motion for a new trial, as the case is thereby controlled. The court overruled both motions, and Lake excepted.

1. The decisions of this court, as well as the act of 1875, allow the practice of submitting questions to the jury by the chancellor, to which they may answer specifically; but those questions must elicit all the facts necessary to found the decree on the verdict, and unless material facts, such as the exact amount due, be found by the jury, no decree can be legitimately rendered upon the verdict. The judge, and not the jury, will decide facts, if any other rule be adopted; but, by our system, the jury, in equity cases, find the facts, and the judge applies the equitable principles thereto. Both together make our court of equity when facts are in dispute.

2. It follows that if the verdict and decree do not harmonize, the decree must be set aside and a new trial ordered, because the judge has found facts which the jury did not, and thus usurped their peculiar province: *46 Georgia Reports*, 362.

3. In this case, it cannot be ascertained what amount the jury meant to charge Lake with and to find against him. In one answer, it is one thing; in another answer, it is another amount; and we really cannot say which should be followed. The chancellor rendered a decree in this case, not following either sum; he thus found the amount of defendant's indebtedness himself, and passed upon that great fact in the cause alone. So, too, he directed that the interest should be compounded at a certain rate and for a certain time; and this he put upon the ground of the fraudulent and corrupt management of the estate by the defendant, a fact on which the jury did not pass intelligently, finding confusedly thereon, un-

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der the charge of the court. We think the question of fraud and corruption one peculiarly within the province of the jury and to be passed upon by them ; and if found by them, it would be, perhaps, right to allow them to find compound interest against any trustee acting corruptly. It will be observed, however, that our statute provides only for the case of trustees *appointed* in this state : Code, sec. 2603.

4. This party, Lake, was an executor appointed in South Carolina. He was sued here as trustee only. We think that the bill should be amended so as to charge him explicitly as executor, and set out that as the character of his trust. The facts make that case, and the *allegata* and *probata* ought, in some degree, to correspond.

5. If the bill were thus properly amended, we are clear that the facts make a strong case against him here in this forum. He moved the property here, converted it here, is no longer in South Carolina and cannot be sued there ; he has failed to prosecute his bill there to settle this estate ; he has instituted no other proceeding there to do so ; he must be, therefore, held responsible here in our courts, and relief will be decreed against him as executor here : 13 *Georgia Reports*, 140 ; 56 *Ibid.*, 326. In so far as 34 *Georgia Reports*, 511, contravenes this principle, it will be found to be overruled in 56 *Georgia Reports*, 326, above cited ; but in the case in 34 *Georgia Reports* it will be seen that no property was in this state, none had been wasted or converted here, and the administrator was on a mere visit here ; resided in Alabama and was administering the estate there.

6. The limitation act of 1869 does not bar a minor ; certainly not a minor with no guardian : 45 *Georgia Reports*, 478.

7. But even if these complainants were not all minors and did have guardians appointed here according to law—they residing here—yet if this executor had a bill pending against them in South Carolina to fix their equities and settle the estate with them, and this bill was undisposed of at the end of the war, they ought not to be barred by the act of 1869.

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It appears that this suit has never been disposed of. The executor pleads it in this case as pending now; yet he takes no steps to prosecute it by establishing copies of the lost papers or burnt papers or otherwise. These complainants had the right to expect him to prosecute that bill which he brought himself, especially as he repeatedly told them that he wished the estate was settled up; and it would be hard indeed, if his own *laches* were imputed to them, and any limitation law be construed to bar them. We hold that this act does not bar their right to sue here, while they had any hope that he would proceed there; but as they waited patiently, without moving until 1875, and without his paying them a cent of what seems to be, by the verdict, their just demand upon him, we think that they are entitled to sue here and now.

8. But even if the right of action had accrued before 1865, so as to bar them, if the jury had found all the above facts against the complainants, still they would not be barred if Lake had acted fraudulently and corruptly. But upon this question the jury did not properly pass. The charge of the court took it from them. That charge made corruption mean any unintentional wrong act, or omission of any duty, by the executor, Lake. We do not so hold. We think those words mean more than mere constructive fraud. They mean actual fraud, actual, intentional wrong doing, willful and corrupt dealing, a purpose to impose upon his *cestui que trust*, and to benefit himself; and so we have, in effect, decided: 55 *Georgia Reports*, 15, and in the same case on the final hearing at the last term. We do not mean to say that the facts in this case do not show fraud and corruption in the sense of the act of 1869; we simply say that the jury must pass upon that issue, not the court; and that the court erred in not permitting the jury to pass upon the question of fraud in its true meaning in that act.

9. For the reasons that the decree does not follow the verdict; that the verdict is too uncertain to found a decree upon in the sum found against the executor, or rather trustee, as he is here charged, and that the jury have not been allowed

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to pass upon, and have not, in effect or substance, found that the executor acted fraudulently and corruptly, and moreover, that the *allegata* and *probata* would more appropriately consist and harmonize with the bill so amended as to conform to the facts in respect to the nature of this trust, that nature being now clearly ascertained, we reluctantly send the case back for a new trial.

Judgment reversed.

THE AMERICAN LIFE INSURANCE COMPANY, plaintiff in error, *vs.* **FATIMA GREEN *et al.***, defendants in error.

1. A policy of life insurance provided that "acceptance of the premium due on this policy by the company or its agents, after the day upon which it is due, must be considered as act of grace or courtesy, and in nowise as forming a precedent for future payment, or a waiver of the forfeiture of the policy according to the conditions therein expressed, if any future payment of premium be omitted on the day it falls due. Agents of the company are in no case authorized to make, alter, or discharge contracts, or waive forfeiture:"

Held, that an acceptance of a premium overdue, by the general agent of the company, was a waiver of forfeiture for that time, the insured being in good health at the date of the payment.

2. Where the policy provided that no receipt for premiums, after the first, should be valid without the seal of the company, a receipt from the agent without such seal was inadmissible in evidence to bind the company; but the payment of the premium could be proved *aliunde*.

3. If, at a certain stage of the proceedings, a non-suit was erroneously refused, and afterwards plaintiff introduced other evidence sufficient to warrant a verdict in his favor, the failure to award the non-suit was not a sufficient ground for a new trial.

Principal and agent. Waiver. Insurance. Evidence. Non-suit. Practice in the Superior Court. Before Judge TOMPKINS. Chatham Superior Court. November Term, 1875.

Reported in the decision.

WILLIAM D. HARDEN, for plaintiff in error.

The American Life Insurance Company *vs.* Green *et al.*

W. U. GARRARD, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant on a life insurance policy, dated the 16th of July, 1870, alleging that the defendant insured the life of Domine Green in the sum of \$2,000 00; that Green died on the 30th of December, 1872, and that defendant is indebted to them the said sum of \$2,000 00.

On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the plaintiffs for the amount of the policy. The defendant made a motion for a new trial on the several grounds therein stated, which was overruled by the court, and the defendant excepted.

The policy had in it the usual stipulation, "that in case the said premiums are not paid as hereinbefore mentioned, on or before twelve o'clock (noon,) on the several days specified and appointed for the payment of the same, then this policy shall be void, and of no effect, and all payments made shall be forfeited to the company," and contained conditions, of which the following only are material to be now considered: "Policies expire at noon on the last day of the period for which payment has been made." "Agents are not authorized to make contracts for the company, nor to write upon the policy except his signature, when necessary, to the first receipt of premium (see condition number five,) nor to waive forfeiture of the same." Condition number five: "Receipts for premiums, excepting the first (to be found on the face of this policy,) will invariably be given on a separate paper, and will not be valid without the seal of the company."

"Acceptance of the premium due on this policy by the company or its agents, after the day upon which it is due, must be considered as act of grace or courtesy, and in nowise to be construed as forming a precedent for future payment, or a waiver of the forfeiture of the policy according to the conditions therein expressed, if any future payment or premium be

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omitted on the day it falls due. Agents of the company are in no case authorized to make, alter, or discharge contracts, or waive forfeiture."

It appears from the evidence in the record that Green died December 30th, 1872, of pneumonia, after ten days' sickness. That up to the time of his last sickness he was in good health. It also appears from the evidence that Shafer was the general agent of the defendant at Savannah, that the premium, for the non-payment of which it was claimed the policy had been forfeited, became due on the 16th of July, 1872. On the 22d of August thereafter, Shafer wrote to Green, the insured, "that his renewal premium of \$47 70 was due last month. I trust you will call at my office and settle the amount at once. If you do not, I will be compelled to return the same to the home office for cancellation." This letter was received by Green, who appears to have been a person of color. The plaintiffs read in evidence two receipts, over the defendant's objections, as follows:

"SAVANNAH, GA., 28th August, 1872.

"Received of Domine Green \$35 00 on account.

"L. M. SHAFER."

"Received, Savannah, October 30th, 1872, of Domine Green, the sum of \$12 70, on renewal of premium number twenty-five thousand five hundred and sixty-two.

"L. M. SHAFER, General Agent."

The plaintiffs also proved by Shafer that he was the general agent of defendant; that as such agent he received from Green, the insured, \$47 70, the amount of the unpaid premium, in two installments, in the fall of 1872, and that Green was apparently in good health at the time he paid the money, and that he frequently received past due premiums from persons of whose health he was assured, and gave the company's receipt for the money. Said renewal receipt was returned to the company in December, 1872; just before the death of Green, but does not know how long before, tendered

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the money back to him. There was a good deal of other evidence introduced, including the correspondence between Shafer and the defendant, but the material facts on which our judgment is based have been already recited.

1. There can be no doubt that if the defendant had chosen to have considered the policy as forfeited on the non-payment of the premium on the 16th of July, 1872, it was its clear legal right to have done so, but its general agent, acting for it, either from courtesy, or for its supposed interest, accepted the premium after the day upon which it was due, and for the doing of which he had the defendant's implied assent, the insured being in good health at the time. It is true the agent had no authority to make, alter, or discharge the contract, or to waive the forfeiture thereof, nor does it appear that he attempted to do so. Under the implied authority contained in the policy, he did accept the premium from the insured one time, after the day upon which it became due. The payment of the premium by the insured to the defendant's general agent, was payment to it, and after receiving the money of the assured for the premium, the law will not allow it to treat the policy as forfeited for the non-payment of that premium, although the agent may not have made any contract or agreement to waive the forfeiture of the policy; good faith and fair dealing forbid that the defendant should receive the premium from the insured, by its authorized agent, and then treat the policy as forfeited for the non-payment of that premium, in case of the death of the insured: Bliss on Life Insurance, section 189; Insurance Company *vs.* Wilkinson, 13 Wallace Reports, 222.

2, 3. By the terms of the contract receipts for premiums, except the first, were not valid without the seal of the company. The receipts of Shafer offered in evidence, did not have the seal of the company thereon, and therefore were inadmissible in evidence against the defendant for the purpose for which they were offered, and the non-suit, as the case then stood when the motion therefor was made, should have been granted. But after the motion for a non-suit was overruled, the plain-

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tiffs introduced other evidence of the payment of the premium by the insured, and upon that evidence being introduced, the overruling the motion for a non-suit was not a sufficient ground for a new trial: *Hanson vs. Crawley*, 51 *Georgia Reports*, 529. The insured might have required that the receipt given to him for the premium by the defendant's agent should have had the seal of the company thereon, but that was a matter which he could have waived if he had thought proper to do so, and which it appears that he did waive by not requiring it: Code, section 10. The only significance in not having the seal of the company to his receipts, was, that he could not use them as evidence against the defendant to prove that the premium had been paid, but that did not prevent him from proving that fact by other competent evidence, the contract being that *receipts* for premiums should not be valid evidence against the company without the company's seal thereon.

4. Whether the defendant's agent tendered back the premium money to the insured, or whether the other pretexts set up by the defendant to defeat the payment of the policy as relates to the acts and conduct of the insured, be true or not, the insured being dead, the credit to which the respective witnesses were entitled, were all questions for the jury to decide.

In view of the special facts of this case as disclosed in the record, we find no error in overruling the motion for a new trial.

Let the judgment of the court below be affirmed.

WILLIAM E. PARAMORE, plaintiff in error, *vs.* ROBERT A. PERSONS *et al.*, defendants in error.

1. Title to land, originating in parol purchase, payment of the purchase money and delivery of possession, long prior to the rendition of judgment against the vendor, the possession being adverse and continuous ever since it commenced, will prevent the sheriff from turning out the claimant of

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such title, and putting in a purchaser at sheriff's sale under the judgment, even though the deed taken by the claimant bears date after the judgment was rendered. Such deed is to be regarded in connection with the equitable title which it was designed to fortify, and not solely as an original conveyance as of the time it was executed.

2. Generally, an injunction against admitting the purchaser at sheriff's sale into possession, will not be granted, where the act of dispossessing the complainant would be a naked trespass: *5 Georgia Reports*, 580; *8 Ibid.*, 119; *11 Ibid.*, 294; *44 Ibid.*, 266; *45 Ibid.*, 201. And see *23 Ibid.*, 318; *3 Kelly*, 207; *6 Georgia Reports*, 423; *52 Ibid.*, 630. Compare *22 Georgia Reports*, 165; *40 Ibid.*, 293; *10 Ibid.*, 576; *32 Ibid.*, 241.
3. The marshal of the United States has only the powers of a sheriff, in the matter of perfecting a sale of land by giving possession to the purchaser, and as, on the facts in the present bill, the marshal could not have turned out the complainants nor the defendant have entered, without committing a trespass, there was no occasion for enjoining the defendant, who is not alleged to be insolvent, from entering under the marshal, and therefore there is no equity in the bill. It is to be presumed, in the absence of any averment on the subject, that the marshal, on being advised by the complainants of the facts constituting their whole title, and especially of their adverse possession at the time of the judgment and for a long period anterior thereto, would have declined to disturb them.

Injunction. Title. Judgments. Trespass. Lévy and sale. Marshal. United States Courts. Before Judge CRAWFORD. Muscogee Superior Court. November Term, 1875.

Robert A. and William H. Persons filed their bill against William E. Paramore, making, in brief, this case:

In the year 1857, one Thomas L. Salter married Susan R. Persons, widow of R. A. Persons, and mother of complainants. Said Thomas L. thereupon took possession of property and money to the amount of \$10,000 00, which belonged to complainants and one Turner Persons, since deceased, as the heirs of their father. He managed these effects, without any letters of guardianship, up to and including the year 1865, when he acknowledged an indebtedness to complainants of \$5,000 00. In part payment of this indebtedness, he sold and delivered to them, in the year 1867, certain lands, promising to execute a title to the same at some more convenient time; but this he failed to do until a few days before his death, which occurred on June 17th, 1873. Complainants have been in the quiet

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and peaceable possession of said lands, claiming the same adversely to all persons, from June 1st, 1867, up to the present time.

In April, 1872, a judgment was rendered by the circuit court of the United States for the southern district of Georgia, in favor of Baker *et al.* against said Salter, for \$2,137 00, principal, besides interest and costs, which has since been transferred to the defendant. The execution based upon this judgment was, on December 19th, 1873, levied upon lands belonging to said Salter, and also upon those conveyed to complainants. On the first Tuesday in February, 1874, these lands were sold by the marshal, and the defendant became the purchaser. At this sale notice was given of the claim of complainants and of this application for injunction.

It was expressly understood between complainants and said Salter, at the time they were placed in possession of said premises, that they had fully paid for the same, they agreeing to cancel \$3,000 00 of his indebtedness to them. These lands were bid off by said defendant at the price of \$200 00, they being worth five times that sum. Since said sale the defendant has threatened to cause complainants to be dispossessed by the marshal, and such officer, under the advice and influence of the defendant, intends to eject them. Complainants have made their arrangements to cultivate said lands during the present year, and have been busily engaged in preparing the same for a crop. If they are now dispossessed, and said defendant be not held responsible for the damages thereby caused, they would be irreparably injured. They therefore pray that the defendant and his confederates be enjoined.

The writ of injunction was ordered to issue. When the case was called for trial, the defendant moved that the bill be dismissed for want of equity. The motion was overruled, and he excepted.

The case proceeded, and resulted in a verdict for complainants. A motion for a new trial was made and overruled. The whole case was brought up, but the only assignment of

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error material here is that based upon the refusal of the court to dismiss the bill for want of equity.

D. H. BURTS, for plaintiff in error.

BLANDFORD & GARRARD, for defendants.

BLECKLEY, Judge.

1. This bill had but a single object, which was to enjoin the defendant from entering into possession of the land, and dispossessing the complainants. The specific act apprehended and sought to be prevented, was, calling in the marshal of the United States to deliver possession of the premises, in consequence of a sale thereof made by him, officially, under a judgment of the circuit court of the United States against a third person, at which sale the defendant in the present bill was the purchaser. The complainants admit that they held the land under the defendant in that judgment, and that the deed from him to them was executed after the judgment was rendered; but they allege various facts amounting, in substance, to a parol purchase of the land several years anterior to the judgment, with payment of the purchase money in full, and simultaneous entry into possession under that purchase, which possession has been, in their own right, adverse, and continuous ever since. The deed was made on no new bargain or consideration, but as the result of these antecedent facts, and to clothe the complainants with full *indicia* of title. Not only did the complainants hold possession of the land at the time the judgment was rendered against their vendor, but the purchase money having been all paid, their possession was rightfully their own. As against him, they were the real equitable owners. They could have maintained a bill to compel him to make the conveyance which he afterwards made voluntarily. That being so, the deed is to be treated as lending support to their prior equity and adverse possession, and not as overthrowing the same: 20 *Georgia Reports*, 120; *Sterling vs. Arnold*, 54 *Ibid.*, 690; *Gwinn vs. Smith*,

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55 *Ibid.*, 145; *Morgan vs. Taylor*, 55 *Ibid.*, 24. The complainants did not lose the equitable title which they had before and at the time of the judgment, by afterwards accepting the formal legal title. Their equitable title, with the adverse possession attending it, being older than the judgment, was sufficient to prevent a summary dispossession by the officer: Code, section 3651; 3 *Kelly*, 207; 6 *Georgia Reports*, 423; 23 *Ibid.*, 318; 44 *Ibid.*, 286; 45 *Ibid.*, 201; 52 *Ibid.*, 630. To hold this, it need not be assumed that, on the trial of the title in court, it would prevail over that acquired at the marshal's sale. If the judgment under which the sale took place was founded on a debt contracted upon the faith of this property before the equitable title originated, that circumstance might so aid the creditor's lien that it would pass a complete title to the purchaser at the official sale, in consequence of the rule that what the creditor has a right to sell the purchaser has a right to buy: See 54 *Georgia Reports*, 543. But the officer, on a mere question of displacing an occupant who held possession in his own right at the date of the judgment, claiming as purchaser, with the purchase money paid, could not enter into a comparison of titles and determine their relative superiority. It would be enough for him that the adverse claim and possession were of longer standing than the judgment.

2. The weight of decisions by this court is against interfering by injunction to restrain a mere trespass: 5 *Georgia Reports*, 580; 8 *Ibid.*, 119; 11 *Ibid.*, 294; 10 *Ibid.*, 576; 32 *Ibid.*, 241; 22 *Ibid.*, 165; 40 *Ibid.*, 293. See Code, section 3219.

3. The marshal's power in the matter of putting purchasers in possession is only a counterpart of that which a sheriff has in like cases: Revised Statutes United States, section 788. For him to remove the complainants, or for the defendant to enter under him, would be a trespass. It is not alleged in the bill that the marshal intends to run over or disregard the complainants' title. Indeed, it does not appear that the facts of their title and possession have ever

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been brought to his notice. The presumption is, that were he fully informed thereof, he would decline to molest the complainants. Assuming that what the bill avers as to the preparations for farming on the land, and as to the irreparable nature of the injury which would result from interfering with their operations as farmers, would give the complainants a claim upon the remedy of injunction stronger than is presented in an ordinary case of trespass, still, to complete their right to such a remedy, they should at least show that they have done all that they ought to do in acquainting the marshal with the facts of their case, and that, nevertheless, their possession is threatened or in peril. It is questionable, even then, if an injunction from a state court could prevent a purchaser from entering under the marshal. Delivery of possession in consummation of an official sale under final process, is a final step in the execution of such process. Certainly, the marshal, himself, could not be enjoined at that stage any more than at a prior one. And it is not clear that a purchaser could be enjoined from receiving possession at the hands of the marshal, any more than he could be enjoined from accepting a deed or making a bid. As we rule that the bill was without equity and ought to have been dismissed at the hearing, on the motion which was made and overruled, it is unnecessary to consider any other question found in the record.

Judgment reversed

GEORGE WILLIAMS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. A plea that the defendant was held under a former indictment for the same offense at the time the indictment on which the trial was proceeding was preferred and found true, and that he be therefore discharged, is not good, the facts being that the judge granted the order to *nol. pros.* the first bill before the second was found, but the same was not drawn and entered of record formally on the minutes until afterwards.

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2. The court did not err in charging that "if the evidence had shown defendant had whipped the deceased with a little switch, not intending to kill him, but simply to chastise him reasonably and properly, and the deceased by some mischance or mere accident had died in consequence thereof, then the defendant could be guilty of nothing more than involuntary manslaughter; but if the evidence shows that the defendant used a weapon likely to produce death, and used such weapon in an unlawful, improper and cruel manner upon the deceased, and had committed such an act as in its consequences naturally tended to destroy the life of the child, and from which the child died, although he may not have intended to kill him, yet it would be murder." Code, section 4327.
3. Nor did the court so err in charging to the effect that, if the body of the deceased showed wounds like those which would be produced by the instrument defendant confessed he had used upon him, then this would be a sufficient corroboration of the confession to justify a conviction, as to require this court to grant a new trial, the rest of the charge submitting the fact of confessions or no confessions fairly to the jury: See *45 Georgia Reports, 43.*
4. Nor in charging that in this case "you should look to the testimony and see what kind of wounds were inflicted upon the child, and whether those wounds could have resulted from natural causes, or whether they must have been the result of violence, and whether there were any persons besides the defendant who could have inflicted them."
5. Even if slight errors had been made, the charge, as a whole, seems to have been fair; the facts and the application of the law to them fully authorize the verdict; the presiding judge is satisfied therewith, and we will not interfere.

Criminal law. Indictment. Malice. Confessions. New trial. Before Judge TOMPKINS. Effingham Superior Court. April Term, 1876.

The following, taken in connection with the opinion, sufficiently reports this case:

The defendant was indicted, tried, found guilty, and a new trial granted.

On the 10th of April, 1876, the judge directed the solicitor general to *nol. pros.* the indictment, and made an entry on his docket that this had been done. Later in the same day, a second indictment was found for the same offense. The solicitor general failed to take the formal order to *nol. pros.* the first until the next day. On the trial, defendant pleaded the

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pendency of a former indictment when the one under which he was tried was found. This plea was overruled.

The evidence for the state made, in brief, the following case: Defendant was heard to say that his child was of no account and he had "a great mind to burst his brains out." Two days afterwards the child was found dead in defendant's house; it was much bruised about the body and head, and its feet was burned. After his arrest, defendant stated that he had whipped the child with a paddle or switch. When questioned about a cut on the child's head, he said that was where he had "shoved it over the head" with a box. The box weighed nine pounds. When further asked about a bruise on the child's stomach, he said that it "nastied" the floor, and he kicked it out of the door. The deceased was about two years old. The crime was committed in Effingham county.

Defendant introduced no evidence. His statement was a denial of the confessions stated by the state's witnesses.

The jury found a verdict of guilty. Defendant moved for a new trial on the following, among other grounds:

1st. Because the court overruled defendant's plea to the indictment.

2d. Because the court made the following charges:

(a) "If the evidence had shown defendant had whipped the deceased with a little switch, not intending to kill him, but simply to chastise him reasonably and properly, and the deceased, by some mischance or mere accident, had died in consequence thereof, then the defendant could be guilty of nothing more than involuntary manslaughter; but if the evidence shows that the defendant used a weapon likely to produce death, and used such weapon in an unlawful, improper and cruel manner upon the deceased, and had committed such an act as in its consequences naturally tended to destroy the life of the child, and from which the child died, although he may not have intended to kill him, yet it would be murder."

(b) "If a man should confess he had killed another in a certain way, and the body of the deceased indicated wounds

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corresponding to the method that the defendant acknowledged to have used, then this would be a sufficient corroboration of the confession to justify a conviction."

(c) "In this case you should look to the testimony and see what kind of wounds were inflicted upon the child, and whether these wounds could have resulted from natural causes, or whether they must have been the result of violence, and whether there were any persons besides the defendant who could have inflicted them."

The motion was overruled, and defendant excepted.

A. P. ADAMS; D. R. GROOVER, for plaintiff in error.

A. R. LAMAR, solicitor general, for the state.

JACKSON, Judge.

The defendant was indicted for the murder of his child less than three years old. The child was the son of a former wife. It was found dead in his house, much bruised and burnt, and the body indicated that it had been badly beaten with instruments other than such as would be used to correct a little child. The defendant had been indicted before and tried and convicted, and the presiding judge had granted one new trial. He was again convicted, moved again for a new trial, the court refused it, and he excepted, and the case is before us.

The points of error relied upon are set out in the head-notes, and our opinion thereon expressed therein, and will be clearly seen and understood when reference is had to the facts set forth by the reporter in this case. Those facts show threats about this motherless child, confessions of guilt to various persons, the use of instruments likely to produce death even on a grown person, the fact that the child "*nastied*" the house, and would not learn to walk, as reasons for his beating him and kicking him out, a horribly bruised, burnt and mangled little corpse, all disclosing a very abandoned heart, and fully authorizing the conviction under the law fairly administered.

Judgment affirmed.

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MONROE SHANNON, plaintiff in error, *vs.* **THE STATE OF GEORGIA**, defendant in error.

1. The evidence in this case being purely circumstantial (consisting principally of a similarity between the tracks found near the scene of the arson and those of prisoner subsequently measured,) slight in its nature, and not inconsistent with the innocence of the defendant, a new trial should have been granted.
2. Where a motion for a new trial is overruled by a different judge from the one who presided at the trial, the weight of the opinion of the latter in support of the verdict, is wanting.

Criminal law. Evidence. Before Judge HALL. Monroe Superior Court. February Term, 1876.

The following, taken in connection with the decision, sufficiently reports this case: The evidence for the state showed that the tracks found near the scene of the arson appeared as if the right shoe was run down—prisoner's right shoe was slightly run down; also that prosecutor and prisoner had an altercation the day before the fire, in the course of which the former cursed the latter.

Two witnesses for the defense swore that they staid at prisoner's house the night of the alleged arson; that he came home about eleven P. M., and went to bed; that they were awakened about one or two A. M., by an alarm of fire, and that prisoner was apparently asleep; that the distance from prisoner's house to the scene of the arson was about three hundred yards.

The case was tried before Judge McCUTCHEON; the motion for new trial was heard by Judge HALL.

J. A. HUNT; J. S. PINCKARD; W. D. STONE, for plaintiff in error.

HAMMOND & BERNER, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of "setting fire to a house in town," and on the trial therefor, was found guilty by the jury, with a recommendation that he be imprisoned

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for life. A motion was made for a new trial, on the ground that the verdict was contrary to law, contrary to the evidence, and without evidence to support it; which motion was overruled by the court and the defendant excepted.

1. The main evidence relied on to connect the defendant with the offense charged, was the fact that certain tracks were discovered near the house set on fire, the next morning thereafter, which were measured but not identified as the tracks of any particular individual. A day or two afterwards, the defendant's tracks, as he made them in a public street, were measured, and the size thereof compared with the tracks found near the house set on fire. There were some other slight circumstances offered in evidence to show the defendant might be guilty of the offense charged, not, however, inconsistent with his innocence, but unless the tracks found near the house set on fire the next morning thereafter were made by the defendant, the verdict cannot be sustained. How is that fact sought to be established? It is sought to be established by a comparison of the size of the tracks found near the house set on fire with the size of the tracks made by the defendant in a public street a day or two afterwards. The prosecutor, who measured the tracks found near the house, states that each one measured eleven inches in length from heel to toe, and three and one-fourth in width across the broadest part of it; that he measured the impression on the ground made by the sole only, both length and width. A witness who measured defendant's track states that it measured ten and three-quarter inches long, and between three and one-eighth and three and one-quarter inches wide; measured his shoes, ten and a half inches long and three and one-quarter inches across.

The defendant may be guilty, but there is not sufficient evidence to authorize his conviction under the law, for it will not do to find a defendant guilty of an offense, and imprison him for life, on *suspicion* that he is guilty. This case comes within the ruling of this court in *McDaniel vs. The State*, 53 *Georgia Reports*, 253, and *Earp vs. The State*, 50 *Ibid.*, 513.

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2. Besides, in this case, the motion for a new trial was not overruled by the judge who presided at the trial, so that we have not the weight of the opinion of the judge who did preside at the trial in favor of the verdict.

Let the judgment of the court below be reversed.

**WILLIAM HARRAL, plaintiff in error, vs. DAVID R. WRIGHT
et al., executors, defendants in error.**

1. If a tenant in common, after tortiously repudiating his co-tenant, resumes the relation before the bar of the statute has intervened, and then repudiates him again, the latter breach of the relation will be a cause of action. And the like rule prevails between bailee and bailor.
2. Where the action is assumpsit for the value of goods converted by a tenant in common or by a bailee, the cause of action is to be considered as having accrued when the defendant *finally* ceased to hold consistently with, or in subordination to, the plaintiff's title, and the plaintiff became aware of it. This time should be ascertained by the jury from all the evidence before them, and not fixed by regarding only a single letter, order, or other document, and the matters specially connected therewith.
3. The law of prescription is not applicable to an action of assumpsit.
4. Where a tenant in common, having possession of the joint property, makes an entry in a book indicating that he no longer holds for his co-tenant, such entry is admissible in his favor, on a plea of the statute of limitations, if notice of it be brought home to the co-tenant; but without such notice, it is not admissible.
5. Notice of an entry in the books of a dissolved copartnership of which both tenants were formerly members, is not notice of a like entry in some other book.

**Statute of limitations. Bailments. Tenants in common.
Prescription. Evidence. Notice. Before Judge TOMPKINS.
Richmond Superior Court. October Term, 1875.**

On June 14th, 1875, Harral brought assumpsit against Wright, executor, and Anna C. Jessup, executrix of William C. Jessup, deceased, for \$6,249 17, alleged to be due for goods and merchandise assigned to plaintiff by the firm of Nichols, Sherman & Company, of which he was a member, upon its

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dissolution, and delivered to defendants' testator to keep for plaintiff until called for. The declaration also contained counts for goods sold and delivered, for money had and received and upon an account stated. The defendants pleaded the general issue and the statute of limitations.

The evidence presented the following facts:

Harral and William C. Jessup were members of a partnership doing business in Newark, New Jersey, New York city, New Orleans, Charleston, South Carolina, and Augusta, Georgia. The other members of the partnership were Barak T. Nichols, Edgar Sherman, Edwin Van Antwerp, Frederick B. Betts, and Samuel A. Church. The parent house was in Newark, where the business was carried on under the firm name of Nichols, Sherman & Company. The New York house was F. B. Betts & Company. The New Orleans house, Edgar Sherman & Company. The Charleston house, Harral, Nichols & Company; and the Augusta house, Sherman, Jessup & Company.

The partnership was dissolved June 1st, 1867, in accordance with articles of dissolution, agreed upon and signed by all the partners. The following are the material provisions of those articles:

F. B. Betts and Edwin Van Antwerp to be trustees to wind up the affairs of the partnership.

An inventory to be taken of all the merchandise in the various houses of the partnership on the 1st of June, 1867, and this merchandise to be divided among the partners in proportion to their respective credits on the books of the consolidated partnership.

The outside indebtedness of the consolidated partnership to be ascertained, then to be apportioned among the partners in proportion to their interest in the consolidation, and notes to be taken by the trustees from each partner for his share of such indebtedness.

The *choses in action* belonging to the partnership to be collected by the trustees, and proceeds applied, *first*, to meet said

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notes; *second*, to *pro rata* division among the partners according to their interest in the consolidation.

The above named trustees to superintend and verify the divisions of merchandise provided for in the articles of dissolution.

The dissolution took place at the time agreed upon, and the trustees entered upon their trust. The inventory showed the amount of merchandise on hand to be divided: \$187,848 25. Jessup's credit on the books of the consolidation showed him entitled to receive \$15,001 62 of this merchandise, and the plaintiff's, Harral's, credit showed him to be entitled to receive \$6,249 17. There was merchandise in the Augusta house to the amount of \$45,337 89. The trustees, carrying out the division, assigned to Jessup, who lived in Augusta and did business there, his \$15,001 62; and to Harral his \$6,249 17, out of the merchandise in the Augusta house. The balance (\$24,087 01,) remaining over and above Jessup's and Harral's portions, seems to have been assigned to Van Antwerp, Nichols and Betts.

Jessup's proportionate share of the indebtedness of the consolidation, for which he was to give his note, was \$11,992 62. Harral's proportion, for which he was to give his note, was \$9,225 08. Neither Jessup nor Harral, in fact, gave any notes; but Jessup paid off \$13,211 47 of the indebtedness. It does not appear that Harral has ever paid off any of the indebtedness. The *choses in action* of the consolidation were not sufficient to pay off its indebtedness. Jessup purchased from Van Antwerp and Betts their share of the goods in the Augusta house. He applied, September 6th, 1876, to Harral, by letter, to purchase his portion. He continued the negotiation, and in a letter of September 16th, 1867, he asks Harral to instruct him what to do with them. In a letter of September 17th, 1867, he called upon Harral to insure his portion of the goods in the Augusta house. September 27th, 1867, he writes Harral that he is informed by the trustees that he has no authority to turn over goods to him, but that according to articles of dissolution Harral must take his pro-

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portion of merchandise out of the Charleston house. He also tells him he must suspend further negotiations for purchase. There were, in fact, no goods in the Charleston house. The inventory, made out in part, at least, by Jessup, showed this.

On the 26th of May, 1868, the trustees wrote and delivered to Harral the following order :

"Messrs. SHERMAN, JESSUP & COMPANY, Augusta, Ga.:

"*Gents:* In the division of the goods of the consolidation, William Harral was to take his share out of the stock in Augusta. You divided your stock on this basis, and now hold to the credit on your books of Nichols, Sherman & Company, Newark, \$6,000 00 and over ; this amount being the property of William Harral, you will transmit over to him."

It does not appear that this order was ever exhibited to Jessup.

Jessup held, at the time of his death, real estate of the consolidation worth \$2,500 00—known as the "Tan-yard."

Jessup, on the 6th of September, 1867, made entries on his journal and ledger, showing that merchandise to the amount of \$6,249 17, was the property of Harral. Subsequently, November 18th, 1867, he made entries in his journal and ledger transferring this amount to Nichols, Sherman & Company. It does not appear that any of these entries were known to Harral, or consented to by him.

James Harral, brother of plaintiff, demanded the goods of Jessup in 1871, when the latter said he had paid more than his share of the debts of the consolidation. When threatened with suit, he requested witness to tell plaintiff that if he would come to Augusta he would endeavor to arrange the matter. The same witness had, about the 29th or 30th day of December, 1872, a similar interview with Jessup, with a like result.

Jessup died December 15th, 1873. After his death, plaintiff had some conversation with defendant, Wright, about the claim. In the course of this conversation, which lasted an hour or two, possibly two hours, he said, in reply to a

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question from Wright, "Why he had delayed bringing suit from 1867 until after Mr. Jessup's death?" "Mr. Jessup was an honorable man; if Mr. Jessup had remained alive the suit would never have been brought."

The jury found for the defendants. The plaintiff moved for a new trial upon the following grounds:

- 1st. Because the verdict was contrary to the law and the evidence.
- 2d. Because the court erred in admitting in evidence the entries made by Jessup in his books, as set forth in the above statement of facts.

3d. Because the court erred in charging the jury that they might find a refusal to deliver on the part of Jessup from his letter to the plaintiff of September 27th, 1867, and if there was such refusal the statute of limitations commenced running from the receipt of that letter.

4th. Because the court erred in charging that if the jury found that the order signed by F. B. Betts and E. Van Antwerp, was delivered to Jessup, and he refused to deliver on that order, then the statute of limitations commenced running from that refusal, there being no evidence whatever that such order was ever presented or refused.

5th. Because the court refused to charge that possession, to be the foundation of a prescription, must be in the right of the possessor, and not of another, and in saying, in substance, that while this was good law, it did not apply in this case.

6th. Because when the jury returned for further instructions, and a juror stated that they were in doubt about the statute of limitations, and that some of them thought that the order of May 26th, 1868, annulled the letter of September 27th, 1867, the court erred in charging that if the jury believed that Jessup meant by the letter of September 27th, 1867, to refuse to deliver the goods to Harral, and it was so received and understood by Harral, then the statute of limitations began to run, as the right of Harral to sue Jessup was then complete, and if he failed to sue for four years from the

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21st of July, 1868, then they should find for the defendants.

7th. Because the court erred in further charging the jury, that if they found that the letter of 27th of September, 1867, was not such a refusal, then if they found from all the evidence, that the order of May 26th, 1868, was presented by Harral to Jessup about that time, and Jessup refused to deliver, then they should find for the defendants.

The motion was overruled and the plaintiff excepted.

BARNES & CUMMINGS, for plaintiff in error.

W. T. GOULD; W. A. WALTON, for defendants.

BLECKLEY, Judge.

If Jessup's possession became adverse for a time, that would go for nothing if, before the bar of the statute attached, the possession ceased to be adverse in consequence of his return to duty, as bailee or co-tenant. As often as he resumed the cast-off relation, he would come again under the law of that relation.

Judgment reversed.

JAMES M. DAVANT *et al.*, executors, plaintiffs in error, vs.
RICHARD G. CARLTON, defendant in error.

1. It is error for the court, in its charge, to express any opinion as to what evidence is the most credible.
2. A sheriff's entry of service is conclusive until traversed and found untrue by the jury.
3. So likewise is a confession of judgment by the attorney of record.

Practice in the Superior Court. Sheriffs. Attorney and client. Judgments. Evidence. Before Judge GIBSON. Greene Superior Court. September Adjourned Term, 1875.

Reported in the decision.

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REESE & REESE, for plaintiffs in error.

M. W. LEWIS & SON ; PHILIP B. ROBINSON, for defendant.

WARNER, Chief Justice.

This was a motion to set aside a judgment obtained in Greene superior court in September, 1866, on the ground that the defendant was never served with a copy of the writ and process in the case in which the judgment was rendered, nor did he waive a copy of the same, nor appear and plead to the action on which the judgment was founded ; and also, on the ground that the judgment was rendered against him without the verdict of a jury, and without any confession of judgment by him, or by any one authorized to confess judgment for him. On the trial of the case the jury, under the charge of court, found a verdict in favor of the movant, setting the judgment aside ; whereupon the plaintiffs in the judgment made a motion for a new trial, on the various grounds therein set forth, which was overruled by the court, and the plaintiffs excepted.

1. It appears from the evidence in the record that the defendant was personally served with a copy of the writ by the sheriff of Greene county, on the 22d day of February, 1866, as shown by the sheriff's return thereon. The following confession of judgment also appears on the declaration:

" We confess judgment to the plaintiffs for the sum of two thousand and twenty dollars, principal, nine hundred and fifty-four dollars and fifty-nine cents, interest, and costs of suit.

P. B. & T. W. ROBINSON,
" Defendant's Atty's.

The bench docket of Greene superior court was offered in evidence, from which it appeared that the names of the law firm of P. B. & T. W. Robinson were entered thereon opposite the names of defendants, in the hand-writing of P. B. Robinson, one of the firm ; that the word "answer" was writ-

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ten opposite the case, and also the word "confession," in the hand-writing of the then presiding judge. It also appears from the evidence, that the confession of judgment on the declaration was in the hand-writing of T. W. Robinson, and that he is now dead. The motion to set aside the judgment, was made by the defendant in March, 1874. The defendant, who was sworn as a witness in his own favor, stated that he had no knowledge of said suit or of the judgment, until the month of May, 1873. Jones, a witness for the plaintiffs, stated that the defendant frequently spoke to him about the suit and judgment, in the fall of 1866, or early part of 1867. Durham testified that in 1868 or 1869, defendant wanted to know of him how he managed to get judgments older than the Davant judgment, as the Davant suit was brought first. The court charged the jury, amongst other things, that if an attorney at law confesses judgment upon the record, he being an officer of court, the presumption of the law is that he had authority to do so, and it requires the strongest testimony to rebut this presumption; "that the evidence of associate counsel, and the party, would be the strongest evidence attainable as to said authority, unless written evidence could be produced." This latter part of the charge was error, because it was an expression of opinion by the court as to what portion of the evidence before the jury was entitled to the most weight and credit, and a new trial should have been granted on that ground.

2. The new trial should also have been granted on the ground that the verdict was contrary to law. When the record of the suit was offered in evidence, with the entry thereon by the sheriff that he had personally served the defendant with a copy thereof, that return of the sheriff was conclusive as to the fact of service until that return of the sheriff had been traversed and found to have been false by the verdict of a jury, which was not done in this case: See *Maund vs. Keating*, 55 *Georgia Reports*, 396; *Lamb vs. Dzier, Ibid.*, 677.

3. So in regard to the confession of judgment by the attor-

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neys of record for the defendant; that confession will be considered as conclusive, especially when the attorney who made it is dead, unless that act of the attorney, as an officer of the court, shall be traversed and found by the verdict of a jury, on the trial of that separate and distinct issue, upon the strongest and most satisfactory evidence, that the attorney had no authority whatever from the defendant to have made it: *Dobbins vs. Dupree*, 36 *Georgia Reports*, 108. And this traverse of the act of the attorney should be made by the defendant at the earliest opportunity after notice of the judgment against him. The record of this case furnishes a striking illustration of the temptation which the evidence act of 1866 holds out to parties, by their own testimony, to vacate and set aside the recorded judgments of the courts of the state whenever it is their interest to do so. "Lead us not into temptation" would seem to be as applicable to legislative enactments, in a moral point of view, as to individual conduct.

Let the judgment of the court below be reversed.

THOMAS N. POULLAIN, SR, plaintiff in error, *vs.* JOSEPH H.
ENGLISH, sheriff, *et al.*, defendants in error.

Where the complainant, Poullain, filed a bill, alleging substantially that one Strain, then deceased, and himself, were the only solvent sureties on the bond of Seabrook, as administrator with the will annexed, of George O. Dawson, deceased; that said administrator had committed a *devastavit*, and that complainant was threatened with a suit by certain legatees of Dawson to answer for the *devastavit*; and that Brown had administered upon the estate of Strain, his only solvent co-security; and that Strain's heirs-at-law, many of them non-residents of Georgia, had recovered a personal judgment against Brown, Strain's administrator, for a *devastavit* he (Brown) had committed on Strain's estate; and that the same was levied upon all of Brown's real estate; and that this judgment against Brown constituted all the assets left of Strain's estate; and that complainant would have to make good Seabrook's *devastavit* alone, unless these remaining assets could be saved so as to make Strain's estate contribute, and that Brown's lands would be sacrificed if sold at this time; and where the prayer was for an injunction to restrain the sheriff and the heirs of Strain from selling Brown's lands:

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Held, that this court will not control the discretion of the chancellor in refusing to grant an injunction to restrain the sheriff from selling the lands and collecting the amount of the judgment.

Administrators and executors. Equity. Injunction. Before Judge BARTLETT. Greene county. At Chambers. September 21, 1876.

Reported in the opinion.

AUGUSTUS REESE; M. W. LEWIS, for plaintiff in error.

COLUMBUS HEARD; H. T. LEWIS, for defendants.

JACKSON, Judge.

Poullain and Strain were the only solvent securities on the bond of Seabrook, who administered, with the will annexed, on the estate of George O. Dawson. Seabrook wasted Dawson's estate. His legatees *threatened* to sue Poullain. Strain, his co-security, was dead, and Brown had administered his estate, wasted it, and Strain's heirs had recovered some \$5,000 against Brown, personally, and levied upon all of Brown's lands. Some of these heirs of Strain lived out of this state. Poullain filed a bill alleging the foregoing facts; and also that Brown's lands would not sell for their value if sold at the present time, and that this judgment against Brown was all that was left of the assets of Strain's estate; and that Strain's estate ought to contribute to the loss he, Poullain, anticipated from the suit of Dawson's legatees, on the joint bond of Strain and himself, and unless he, Poullain, could secure these assets, he was remediless to make his co-security contribute. He therefore prayed an injunction restraining the sheriff and Strain's heirs from selling Brown's lands. The injunction was refused, and Poullain excepted.

Unless a court of equity ought to intervene to prevent the lands of Brown from being sold in hard times when they would not bring full value, at the suit of one interested like Poullain is, we cannot see any equitable reason for interfering

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with the judgment of the chancellor. Hard times constitute no ground for equitable interference to stop a judgment at law from making the money recovered, out of a defendant's lands at the suit of anybody, so far as we know or have heard. Indeed, it is not alleged that the lands will not bring the judgment, or that Brown is insolvent; but if it were, a court of equity would not stop the sale of the lands under a judgment at law for such a reason. Nor should it arrest the sale of the lands by the sheriff at the prayer of Poullain under the state of facts alleged. It seems to us to be the interest of Poullain as well as that of the heirs of Strain, to have the money realized on the judgment, and in the hands of this officer of the court. If there be any equity in the facts of his case, to restrain the heirs of Strain from taking the money out of the state without giving bond to have it forthcoming to contribute to the defense of the *threatened suit* by Dawson's legatees against Poullain, or rather to the recovery that they might make from Poullain by the *threatened suit*, then this equity could be asserted after the fund is in the hands of the sheriff. We do not decide that there is such equity, or that there is not. It would depend much upon the nature of the threats, the ground of the apprehension, and the distinctness of all the allegations; and even then it might be very doubtful whether, before suit, and on mere apprehension of it, though pretty well grounded, a court of equity would restrain the heirs of Strain from collecting and using money that they had recovered by judgment at law on a *devastavit* against the administrator. It would at least require bond to indemnify them, and put complainant upon such terms that the heirs of Strain should not be hurt. However all this may be, and we make no ruling on the subject now, we are satisfied that the chancellor did not abuse his discretion in refusing to stop the sheriff from making the money on this judgment, and we affirm, on this ground and in this view, his judgment thereon.

Judgment affirmed.

The Summerville, etc., Company *vs.* The Deutscher, etc., Club.

THE SUMMERVILLE MACADAMIZED, GRADED OR PLANK ROAD COMPANY, plaintiff in error, *vs.* THE DEUTSCHER SCHEUTZEN CLUB, defendant in error.

1. The law does not provide for the assessment of damages to be paid by private persons as a condition precedent to opening a public road. When the proceedings are had which are provided for, only the county or the owner of the land can complain of the verdict by writ of *certiorari*: Code, section 645. The writ issues to the justice of the peace who presided at the assessment, and not to the county judge or the ordinary.
2. When the owner of the land and certain persons who petitioned for the road consented to refer to the county judge the legal effect of the verdict for damages, it was a mere private arrangement, and the superior court could not, on *certiorari*, at the instance of the petitioners for the road, reverse the action of the county judge, and order the road opened without the payment of any damages.

Certiorari. Roads. County matters. Before Judge GIBSON. Richmond county. At Chambers. March 16th, 1876.

The Deutscher Scheutzen Club presented its petition to the judge of the county court of Richmond county, for the opening of a public road which would cross the road of the Summerville Macadamized, Graded or Plank Road Company. Commissioners were appointed who reported that the proposed road was of great public utility, and recommended that it be of the width of eighty feet. The Summerville, etc., Company filed objections to the application. The county judge ordered that the public road prayed for be opened thirty feet in width, etc., upon the payment by the petitioner of the costs of the proceedings, and of such damages as may be legally assessed in favor of the *caveator*. He further ordered that a jury of freeholders be summoned to try the question of damages to be assessed, if any, in favor of *caveator*.

By agreement of counsel, the jury were to return a special verdict finding the facts, the legal right of *caveator* to the damages assessed to be determined by the court upon argument. The jury thereupon found as follows:

"We, the jury, find for the Summerville Plank Road Company the sum of \$1,000 00 for the purchase of land and

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the building of a new toll-house and toll-bar. The house to be two rooms, well plastered, with two fire places, cooking room attached, with one-half acre of land, in full of all damages at the crossing at the road from Crawford avenue to the Scheutzer Platz grounds."

The right of the *caveator* to any damages was submitted to the county judge upon an agreed statement of facts, immaterial here. He ordered as follows:

"It is considered that by the construction of the new road, consequential damage will flow therefrom in necessitating the erection of a new toll-gate, and as the jury impaneled to try the issue as to amount, have rendered a verdict for \$1,000 00, it is ordered that the petitioners open said road after they shall have paid to said Summerville Graded or Plank Road Company, said sum of money, or otherwise complied with said verdict, and it is further ordered that petitioners pay all costs," etc.

To this order the Deutscher Scheutzen Club excepted, and petitioned for the writ of *certiorari*. The petition was sanctioned and the writ issued, directed to the judge of the county court. Upon final hearing the superior court held that the Summerville, etc., Company was not entitled to the consequential damages found by the jury, and directed that the order for damages be set aside, and said road opened.

To this judgment the plaintiff in error excepted.

FRANK H. MILLER, for plaintiff in error.

BARNES & CUMMING, for defendant.

BLECKLEY, Judge.

An examination of those sections of the Code applicable to proceedings for opening public roads, will make it apparent that the controversy sought to be carried on between these parties is not provided for. The county and the land-owner are not litigating.

Judgment reversed.

Killorin *et al.* vs. Bacon.

PATRICK KILLORIN *et al.*, plaintiffs in error, vs. DEWITT C. BACON, defendant in error.

1. Where there are but two witnesses to a transaction and their evidence is irreconcilable, the jury must determine, from all the circumstances connected therewith, which is entitled to the most credit and return their verdict accordingly.
2. Where a creditor holds two claims against a debtor, and a payment is made without direction as to its application, and the creditor makes no appropriation thereof, the law will direct the application in such manner as is reasonable and equitable both as to parties and third persons. Generally the oldest lien and the oldest item in an account will be first paid, but the law is not so imperative as to authorize the jury to be directed to apply the payment to the oldest claim.

JACKSON, Judge, concurred on special grounds.

Evidence. Appropriation of payments. Debtor and creditor. Before Judge TOMPKINS. Chatham Superior Court. February Term, 1876.

Reported in the decision.

WEST & CUNNINGHAM, for plaintiffs in error.

R. E. LESTER; T. R. RAVANEL, for defendant.

WARNER, Chief Justice.

It appears from the record and bill of exceptions in this case, that Bacon sued the defendants in a justice's court, on a draft for \$82 50, drawn by Killorin and accepted by Hogg. The justice gave judgment for the plaintiff for the amount of the draft, and the defendants appealed to the superior court. On the appeal trial the jury, under the charge of the court, found a verdict for the plaintiff. A motion was made for a new trial on the several grounds therein set forth, which was overruled by the court, and the defendants excepted.

It appears from the evidence in the record, that Bacon held a note on Killorin for \$400 00, of older date than the draft; that one day the parties met in the street, when Killorin handed Bacon an order for \$100 00, and told him, as he testi-

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fied at the trial, to credit it on the draft now sued on, which Bacon did not do, but credited it on the \$400 00 note. Bacon also testified at the trial, that when Killorin handed him the order in the street, that he said he had an order for \$100 of Collins, "which I will give you on my note if you will take it, and will pay the balance along." Witness took the order, credited it on the note, and collected it. Killorin told him to credit the order on the note.

The court charged the jury, amongst other things: "That if they were unable to reconcile the conflicting statements of the plaintiff and Killorin, and were unable to make up their minds which was correct in his statement, that they must find for the plaintiff; that if the \$400 00 note was the oldest debt due to Bacon from Killorin, the law will direct the payment of the \$100 00 order of Collins to be credited on that note, and they must find for the plaintiff."

1. In view of the evidence in the record, this charge of the court was error. The charge of the court assumed the law to be, that if the evidence of the two witnesses sworn on the trial, was so conflicting that they were unable to make up their minds which had made the correct statement in relation to the main question in controversy between them, that they must find a verdict for the plaintiff. We do not so understand the law as applicable to the evidence in this case. The law devolved the duty on the jury to have reconciled the conflicting evidence of the two witnesses, if possible, without imputing perjury or bad motives to either of them, but if their testimony was irreconcilable, then they must determine, from all the circumstances connected with the transaction about which they testified, who was entitled to the most credit, and have found their verdict accordingly, and so the court should have charged the jury. The charge of the court relieved the jury from the performance of a duty which the law devolved upon them.

2. The court also erred in charging the jury, "that if the \$400 00 note was the oldest debt due to Bacon from Killorin, the law will direct the payment of the \$100 00 order of

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Collins to be credited on that note, and they must find for the plaintiff." By the 2869th section of the Code, where a payment is made by a debtor to a creditor holding several demands against him, the debtor has the right to direct the claim to which it shall be appropriated. If he fails to do so, the creditor has the right, at his election, to appropriate it. If neither exercises this privilege, the law will direct the application in such manner as is reasonable and equitable both as to parties and third persons. As a general rule, the oldest lien and the oldest item in an account will be first paid, the presumption of law being that such would be the fair intention of the parties. Thus it will be perceived that the law did not direct, as the court charged, that the Collins order *should* be credited on the \$400 00 note, and therefore the jury *must* find for the plaintiff. The law directed the application of the payment of the order (upon the hypothesis that neither party had directed its appropriation) in such manner as the jury, under the facts of the case, might have considered reasonable and equitable both as to the parties, Bacon and Killorin, and Hogg, the acceptor of the draft, in view of the general rule of law applicable thereto.

Let the judgment of the court below be reversed.

JACKSON, Judge, concurring.

I concur in the judgment of reversal solely because the court said to the jury that if they could not decide between the two witnesses in this case *the law would apply the payment to the oldest debt*; he should have told them that in such a case "the law will direct the application in such manner as is reasonable and equitable, both as to parties and third persons," and that, "as a general rule, the oldest lien and the oldest item in an account will be first paid, the presumption of law being that such would be the fair intention of the parties." In this case a security or accommodation indorser may have been interested, and therefore the jury might have found that it was more reasonable and equitable not to apply it to the oldest debt: See Code, section 2869. I do not concur in



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the opinion that the court should have forced the jury to find one way or the other on the question of how the parties directed the application of the payment to be made when one swore one way and the other another, both being equally entitled to credit, and no other fact or circumstance in the case turning the scale. In such a case, I think, as the verdict of a jury under our practice is general, and not special—for the plaintiff or for the defendant—that it was the duty of the court to tell the jury that if they could not decide between the two witnesses, then the law applied the payment to that debt which was more reasonably and equitably entitled to it, in looking at all the circumstances affecting not only the parties but third persons; and that if they saw nothing in the case to satisfy them that it would be more equitable to apply the payment to the younger debt, then it should be applied to the older, as the presumption of law is that, in the absence of some controlling equitable fact, it was the intention of the parties to pay the oldest debt first. I think the court below erred, not in telling the jury that if they could not decide between the two witnesses, that is, if they could not find the fact that the parties had directed the application of the payment and how it was to be applied, then the law directed its application, but in telling them that the law directed it to go then to the oldest debt without regard to any equities which might control the general rule, thus disregarding or not noticing the statute: Code, section 2869. This was a plea of payment; it devolved on the defendant to prove he paid it, if at all, by directing this money to go on this draft sued on; he swore he did so direct, the other party swore he did not; if the jury could not decide between them, that is, if they could not find that the direction was given, then, of course, the law directed to what debt it should go; that law should control the verdict, and the court should tell the jury what that law was. It will be remembered that this court, at the last term, held that under our system a verdict was made up of law as well as of fact.

I cannot agree with a majority of the court that the jury

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must decide between two opposing witnesses, or there can be no verdict; and mistrial after mistrial thus ensue, absolutely stopping the wheels of justice. On the contrary, I think, in such a case, the law will be applied by that logic which in the case last cited, it is said was also an ingredient of a verdict, to the remaining undisputed facts, and the verdict will be according to its mandate. What is not proven does not exist in law, and the oath of one witness, contradicted by that of another equally respectable, with no circumstance to turn the scale, proves nothing, and the fact alleged does not exist, and the jury should find without regarding it, and the court should fully instruct them what the law required them to do under such circumstances.

C. E. WALTERS, executrix, *et al.*, executor, plaintiffs in error,
vs. WILLIAM MONTGOMERY, receiver, defendant.

1. It must be a very strong case to authorize a court to hold that a receiver of an estate had no power to sell when authorized to do so by an interlocutory decree in chancery, if indeed it should be so held in any case at all.
2. Representation at the sale by the receiver that the land is free from encumbrance is the truth, and no fraud upon the purchaser, if, though the land be levied upon by judgment and *s. fa.* against a former vendor and the claim case be then pending, it results that there was no encumbrance, by the verdict of the jury that the land is not subject but is the property of the receiver's estate, especially if the levy was notorious and proclaimed at the sale. In such a case *caveat emptor* applies with double force, and the chancellor did right not to disturb the sale or grant an injunction.

Equity. Receivers. Injunction. Sale. Before Judge KIDDOW. Dougherty Superior Court. October Term, 1875.

Jeremiah Walters having died whilst this case was pending before the supreme court, his legal representatives were made parties in his stead. The facts are reported in the opinion.

VASON & DAVIS; Z. J. ODOM; D. H. POPE, for plaintiffs in error.

Walters *et al.* vs. Montgomery.

WARREN & HOBBS, for defendant.

JACKSON, Judge.

Montgomery, as receiver of the estate of Turner Clanton, sold a plantation known as the Porter place, in Dougherty county, at public outcry, by virtue of an order of the chancery court of Richmond county, which had appointed him receiver. He sold for part cash and part credit. Walters was the purchaser, and when the note fell due he failed to pay, and Montgomery sued on the note and proceeded to foreclose a mortgage on the land for the note which was given for the credit part of purchase money. Walters filed a bill to enjoin the suit and foreclosure, on the ground that Montgomery, by his auctioneer, proclaimed that the land was free from encumbrance, whereas a levy had been made upon it as the property of Tarver, and the claim was then pending. The bill alleged that, but for this encumbrance, Walters could have sold the land for as much as he gave for it. It turned out on the trial of the claim that the property was found not subject, and therefore that the representation that there was no encumbrance was true. It was in proof, too, by affidavit, that notice of the judgment and levy was given at the sale, and the answer set up that the fact was notorious and well known to counsel of Walters. The chancellor refused the injunction, and the complainant, Walters, excepted.

1, 2. We think the chancellor did right. The levy was a mere *brutum fulmen*, it was no encumbrance as it turned out, and ought, besides, to have been known to the purchaser. It was *lis pendens*, it was proclaimed at the sale according to one affidavit and notorious, and especially well known to Walter's counsel, according to defendant's answer. The complainant was only hurt by the fall in the price of property, by no fault of the receiver, and cannot equitably ask relief. Something was said in the argument about the power of the receiver to sell under the will of Clanton, but he had an interlocutory order from the chancellor to do so. Reliance was

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also put upon some other documentary evidence from Richmond county, but it appeared only in the record, and was not in any exhibit to bill or answer. Even if it had been certified as evidence, it would take a very strong case to show the want of power in a receiver to sell after the court of chancery, whose officer he was, had ordered the sale.

Judgment affirmed.

JOSHUA TUCKER, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. The evidence shows the guilt of the defendant beyond a reasonable doubt.
2. When it is established that a larceny has been committed, the fact that the stolen goods were immediately thereafter found in the possession of the defendant, is presumptive evidence of his guilt.
3. Notwithstanding overwhelming evidence of guilt, it is error for the court to charge that the jury *should* return a verdict of guilty.
4. It is objectionable in the court to discredit the prisoner's statement by comparing it with the evidence and showing discrepancies.

See concurring opinion of JACKSON, Judge.

Criminal law. Before Judge TOMPKINS. Chatham Superior Court. November Term, 1875.

The following, taken in connection with the decision, sufficiently reports this case:

The state's evidence made, in brief, the following case: On September 1st, 1875, a case of hats on board a steamer lying at the Savannah wharf, was broken open, and a number taken therefrom. About six o'clock in the evening, the discharging clerk saw prisoner, who was one of the hands employed in unloading the cargo, coming from the vessel with a large bundle of clothing and a crocus bag under his arm. The clerk hailed him; went up and took hold of the bag; prisoner dropped it and ran. On opening it ten of the hats were found. A bystander went for a policeman. When prisoner saw them coming he ran into a house, where he was arrested.

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Prisoner's statement was, in brief, as follows: One Hector and Eliza Williams broke open the box and took the hats about half-past five P. M., while prisoner was in the hold of the vessel. The hats prisoner had were not from that lot, but were given him by the quartermaster, about two o'clock, P. M., to sell on commission. When stopped by the clerk, he stated that the bag contained things given him by the quartermaster.

The jury found a verdict of guilty. Defendant moved for a new trial, on the following, amongst other grounds:

1st. Because the court charged that if the stolen goods were found in defendant's possession at the time of, or immediately after, the larceny, then the law presumes him guilty. The burden of proof is on him to show that he obtained the goods honestly, and if he fails to do so, you should find him guilty.

2d. Because the court charged substantially as follows: As to the prisoner's statement, you may consider whether it is reasonable, probable, and bearing the appearance of truth, or whether it is unlikely and contradictory. You can consider whether it is possible that he could have been in the hold of the ship and seen the box opened after the time when the state claims that he was arrested.*

The motion was overruled, and the defendant excepted.

A. P. ADAMS, for plaintiff in error.

A. R. LAMAR, solicitor general, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of "larceny from the vessel," under the 4408th section of the Code, and upon his trial therefor, was found guilty. A motion was made for a new trial on the various grounds stated therein,

* According to this portion of the charge of the court, the state claimed that the defendant was arrested at one o'clock, P. M., on the day of the larceny. The brief of evidence would seem to show that he was apprehended after six o'clock on that day. There is no testimony showing his arrest before that hour. (R.)

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which was overruled by the court, and the defendant excepted.

1. The evidence in the record, in our judgment, was sufficient to satisfy the jury, beyond a reasonable doubt, that the defendant stole the hats from the vessel as alleged in the indictment.

2, 3. That part of the charge of the court to the jury, to-wit: "Whenever it is established that a larceny has been committed, and the stolen goods are immediately afterwards found in the possession of a person, that fact is presumptive evidence that the person is guilty of the larceny of the character charged to have been committed," was unobjectionable; but that part of the charge, to-wit: "If you further believe, from the evidence, that a portion of the stolen goods were, at the very time, or immediately afterwards, found in the possession of the defendant, then the law presumes that the defendant is guilty of the offense of larceny from the vessel, and the burden of proof is upon him to show that he obtained the goods honestly, and if he fails to do this, you *should* find him guilty of the offense charged," was error, according to the ruling of this court in *Parker vs. The State*, 34 Georgia Reports, 262.

4. The charge of the court was objectionable in regard to the statement of the prisoner, in so far as it attempted to show by argument that his statement was not true, from the evidence. But, notwithstanding the court may have erred in its charge to the jury, still, the verdict was right under the evidence and the law applicable thereto, and we will not disturb it.

Let the judgment of the court below be affirmed.

JACKSON, Judge, concurring.

I concur in the judgment of the court in this case, but not in that part of the opinion which condemns the court below for charging the jury to the effect that if certain facts exist, then the law presumes that the defendant is guilty, and that they *should* find him guilty. On the contrary, I think it

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is the duty of the court, always to make a practical application of the law to the facts, and always to tell the jury that if, from the evidence, you find the facts to be so and so, then the defendant is guilty. Nor does the case in 34 *Georgia Reports*, 262, conflict with this view. The complaint there was that the present chief justice emphasized a little too strongly the words, "*you ought to find him guilty;*" and the then Chief Justice LUMPKIN, merely questions the propriety of this charge *in this emphatic way*, and all that he says about it is in the shape of a question, a mere query. In this case, the court charged the jury to the effect that if these goods stolen from this vessel, were found shortly after they were missing in possession of the defendant, then the law presumed him guilty, unless he explained how he came by them, "*and you should find him guilty.*" I think that the charge was exactly right; and notwithstanding the criticism of Chief Justice LUMPKIN, upon Chief Justice, then Judge WARNER, on the circuit, I think that if Judge Tompkins had added, with emphasis, *and you ought to find him guilty*, instead of "*you should find him so,*" he would not have been wrong. Of course the judge should always charge in respect to reasonable doubts, as he did in this case.

I think the fault usual among presiding judges on jury trials, is that they deal too much in generalities, the jury not understanding what they mean; always, they should make the law clear and easily to be understood by the jury, and to do this they must practically apply it to the facts by telling the jury that if you believe, from the evidence, such to be the facts, then such is the law, and defendant is guilty, and you should so find. I cannot, therefore, give my concurrence to the construction put upon Judge LUMPKIN's remarks or questions, in 34 *Georgia Reports*, nor to the condemnation of Judge Tompkins' charge in this case.

McNulty et al. vs. Marcus.

JOHN McNULTY et al., plaintiffs in error, vs. SOLOMON MARCUS, defendant in error.

1. The proper judgment against an administrator, in an action upon his administration bond, at the suit of a creditor of the intestate, is *de bonis propriis*; and that is the character of the judgment now in question, notwithstanding it describes the defendant as administrator.
2. Though it does not appear, from the pleadings, or otherwise, that the plaintiff, as a creditor of the intestate, had obtained a prior judgment, *de bonis testatoris*, before suing upon the bond, the judgment on the bond, against the administrator alone, (his sureties not being parties) is not void; nor will it, in the distribution of money raised from the sale of his property, be postponed to judgments of younger date in favor of his personal creditors.
3. When the defendant and his counsel were present at the trial of a civil action founded on contract, and the case was submitted to a jury, without an issuable defense filed on oath, and the amount for which a verdict ought to be rendered was, after the introduction of testimony, agreed upon by counsel in open court, the verdict rendered in pursuance of such agreement is not a nullity, but is equivalent to a confession, and will support a judgment entered up by plaintiff's attorney in the usual form.
4. A docket entry of "settled," made by the judge, and not transferred to the minutes, is no evidence of the terms of settlement; nor can any inference be drawn therefrom, on the trial of another case, between other parties, that the debt sued for was extinguished.

Administrators and executors. Judgments. Verdicts. Practice in the Superior Court. Evidence. Before Judge GIBSON. Richmond Superior Court. April Term, 1876.

Levy, ordinary of Richmond county, for the use of Solomon Morris, sued Michael O'Dowd, and the securities on his bond, as administrator of E. H. Gray, deceased. The breach of duty assigned was the failure of O'Dowd to pay certain notes of one Berckman, indorsed by Gray. The securities filed a demurrer for want of jurisdiction and misjoinder, which was sustained, and the action dismissed as to them, but proceeded as to O'Dowd.

O'Dowd filed no issuable defense on oath. There was an admission, through his counsel, after examination of his account, of his personal liability to plaintiff for the amount of \$1,527 08, it being conoeded that his intestate was indebted to plaintiff on the notes set forth in the declaration, and that

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from the amount collected, after payment of expenses and other claims in the course of administration, there was a balance due by him to plaintiff of \$1,527 08, for which verdict was then taken by counsel. Plaintiff claimed the whole amount of the notes, to-wit: the sum of \$2,000 00, with interest, which claim was resisted, on the ground that, having applied a part of the assets which had come into his hands, as administrator, to the payment of debts of the estate, he was not liable to creditors for the whole amount of said assets. This question, and what proportion of the assets which came to his hands should be applied to plaintiff's claim, were the issues before the jury. After the testimony of O'Dowd was in, and a calculation made by counsel on both sides, the amount was agreed to be that for which the verdict was accordingly taken.

On this verdict judgment was entered the same day against "Michael O'Dowd, administrator of E. H. Gray." Execution issued accordingly, and was returned September 25th, 1874, with an entry of *nulla bona*.

On September 26th, 1874, suit was instituted in Richmond superior court in favor of Levy, ordinary, for the use of Solomon Morris *vs. O'Dowd*, principal, and Primrose and Hallahan, securities, on the bond of Michael O'Dowd, administrator of E. H. Gray, in which is assigned as a breach of the bond, the failure to pay the judgment rendered against O'Dowd, administrator of E. H. Gray, June 11th, 1874. At April term, 1875, the docket shows, in the handwriting of the judge, that this case was settled.

The *fi. fa.* issued against Michael O'Dowd, administrator of E. H. Gray, was assigned April 13th, 1875, without recourse, to Solomon Marcus, and levied March 30th, 1876, on one gray horse and wagon, and the stock of goods in the store of Michael O'Dowd, in Augusta, Georgia. On April 7th, 1876, on the petition of Solomon Marcus, the goods were ordered to be sold by the judge of the superior court.

On April 14th, 1876, three *fi. fas.* in favor of McNulty and others against O'Dowd, issued under judgments of younger date than that under which the levy was made, were placed

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in the hands of the sheriff, together with the usual notice to retain the money arising from the sale of the stock of goods. The sale did not realize sufficient to pay off the *f. fa.* of Solomon Marcus, if valid.

On a motion to distribute, the judge held the *f. fa.* valid, and ordered the money to be paid over to Marcus, to which ruling McNulty *et al.* excepted, and assigned error as follows:

1st. In considering any evidence other than the record which showed no plea to have been filed.

2d. In holding, under the facts admitted as to the trial, that there was such a defense filed or issue joined as required a verdict of a jury instead of an award, and that the same was binding.

3d. In holding that the court, under the allegations contained in the writ, had jurisdiction over O'Dowd, so far as to render a judgment against him, either individually or as administrator, which was valid as against other creditors.

4th. In holding that the verdict and judgment was a personal one against O'Dowd, and entitled to priority in the distribution.

5th. In holding that the second suit on the bond and the entry of "settled" on the judge's docket, in nowise affected the validity of the judgment.

To the usual certificate, the judge added the following explanation: "I only decided in this case that the court had jurisdiction, and a plea was unnecessary; that when defendants are represented in court by counsel, and a consent verdict taken, it is good and binding; that if the verdict and judgment rendered was against the administrator upon the admission of assets, it bound him individually, and that the judgment could be enforced against him personally. The entry of a subsequent suit, afterwards commenced against the principal and his sureties, as 'settled,' only affected the suit then pending, and unless payment was shown or to be inferred, the original judgment against O'Dowd was not affected thereby."

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FRANK H. MILLER, for plaintiffs in error.

BARNES & CUMMING, for defendant.

BLECKLEY, Judge.

1. The bond given to the ordinary by an administrator for the faithful execution of his trust, is the personal contract of the administrator. A suit upon it must necessarily be against him personally, not against him in his representative character. To recover in the suit, a breach of the bond must be established; and a judgment for the plaintiff is conclusive evidence that a breach was established. The only judgment for the plaintiff, legally possible, is a judgment *de bonis propriis*. If, in writing it up, representative terms be added to the defendant's name, they are mere description of the person, and are utterly impotent to modify the legal effect of the judgment. The dismissal of the action as to the administrator's sureties, left it pending against him alone, but it was still on the bond, and on the bond, there was a recovery by the plaintiff as to the then sole defendant. In entering judgment against him, he was described as administrator, but that did not, and could not hinder it from acting directly upon his own property. There was no direction in the judgment that the sum recovered should be levied of the goods, etc., of the intestate, nor could such a direction have been legally incorporated.

2. There is no suggestion that the creditor for whose benefit the bond was sued to judgment was not a real, *bona fide* creditor of the intestate, or that the amount recovered was more than was his due. The judgment cannot be pronounced void because it does not appear that a prior judgment *de bonis testatoris* had been rendered, and a *devastavit* established. That was matter to be insisted upon in resistance to the action upon the bond. By not insisting upon it, the administrator waived it. By suffering judgment to go against him, in a suit upon the bond, he made the debt his own, as much as if he

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had given his individual note for it, and then suffered the note to be sued to judgment without pleading want of consideration or any other defense. There being no fraud alleged, his creditors are bound, as well as himself. He is to be presumed to have submitted rightfully to the liability which the judgment imposes. The fair inference is that he had either wasted the assets of the estate, or still had them, to an amount sufficient to indemnify himself. The presumption of sufficient assets is raised by giving a note: 25 *Georgia Reports*, 242. Surely the presumption is much strengthened by suffering a judgment to be recovered on the administrator's bond. Besides, in this case, assets to the amount of the judgment were expressly admitted. It is to be borne in mind that the sureties upon the bond are not affected, the action as to them having been dismissed. The case thus stands clear of any conflict with 52 *Georgia Reports*, 35, even if it were conceded that otherwise conflict would exist.

3. In respect to the point that the judgment was based on the verdict of a jury, rendered in the absence of an issuable defense filed on oath, this case is distinguishable from that reported in 55 *Georgia Reports*, 475. In that case there was no consent by the defendant to the verdict or to a trial by jury. It was stated in the record of that case, or at least clearly inferable, that the trial was *ex parte*, and took place in the absence of defendant's counsel. Here, on the contrary, the defendant was present and was a witness, giving testimony to the jury. He was also represented by counsel, and the amount of the recovery was agreed upon. The verdict was thus matter of consent. There was an implied waiver of the defendant's right to have the court render a judgment without the intervention of a jury. To say the least of a verdict rendered under such circumstances, it is equivalent to a confession of judgment.

4. It seems that a second suit was commenced on the administration bond, after the first had terminated as above disclosed—that is, after dismissal as to the sureties, and after judgment against the principal. This second suit was en-

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tered on the bench docket "settled," but the like entry did not appear on the minutes. A mere docket entry of "settled," cannot be relied on to extinguish a prior judgment for the same debt. The settled suit was, when brought, doubtless intended to reach the sureties on the bond, and if they or the principal paid any part or the whole of the debt to get that suit settled, the fact of such payment should have been proved. It is not to be inferred from the docket entry. The settlement of the second suit is entirely consistent with leaving the judgment already obtained in the first, unpaid and in full force. For this reason, the entry, if transferred to the minutes, would not, by itself, have established anything to the discredit of that judgment.

The result is, that the fund in controversy was properly disposed of.

Judgment affirmed.

SAMUEL H. GALLOWAY, plaintiff in error, *vs.* THE WESTERN AND ATLANTIC RAILROAD COMPANY, defendant in error.

1. Under the act of 1870, the Western and Atlantic Railroad Company is only liable to be sued, as a corporation, for damages sustained on the line of its road.
2. Where an employee of a railroad company agrees to assume all risk incident to his employment, the fact that he was running over another railroad at the time of the injury, does not release him from such agreement. If, while running over such other road, he is in the employ of the former company so as to make it liable for the injury, his agreement remains binding.
3. It was not error in the court to charge that if the jury found that plaintiff executed the agreement offered in evidence, the effect of it was to waive all right to sue and recover for injuries sustained while in the employment of said road. Such charge is merely a statement of the legal effect of a written instrument.

BLECKLEY, Judge, concurring:

1. The employee of a railroad company is in fault when he knowingly exposes himself to extraordinary danger at night, by assisting to carry a train

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over the unsafe track of another railroad. The corporation does not insure his safety against reckless locomotion which he assists to conduct, with knowledge that it lies outside of his regular employment, and that it is extra hazardous on account of the unfitness of the appointments. He cannot rightfully presume that the corporation has authorized, or will sanction, the order of any officer or agent who directs business to proceed, under circumstances which place both life and property in obvious and unusual peril.

2. The court, in construing the written contract, intimated no opinion forbidden by statute; and if errors of construction or other errors were committed, they were harmless, as the plaintiff barred himself from recovering by facts to which he himself testified.

JACKSON, Judge, concurring:

1. Although the contract of plaintiff to take all risks was, in its letter, confined to the road-bed of the Western and Atlantic Railroad, yet, when he voluntarily accompanied a train run by the company which employed him, on the track of another company, the spirit of his contract to assume all risks accompanied him there, and he cannot recover for injury by the company or his co-employees.
2. When the plaintiff receives and retains money from the company which employed him, on the faith of the statement by him that he did not mean to sue for damages, he is estopped from so suing.

Corporations. Railroads. Contracts. Charge of Court. Negligence. Estoppel. Before Judge HOPKINS. Fulton Superior Court. October Term, 1875.

Reported in the decision.

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COLLIER & COLLIER; P. L. MYNATT, for plaintiff in error.

JULIUS L. BROWN, for defendant.

WARNER, Chief Justice.

The plaintiff brought his action against the defendant to recover damages for injuries alleged to have been sustained by him as an employee of defendant, by reason of the negligent and unskillful conduct of the defendant's agent in running a certain train of defendant, conveyed by a steam locomotive, upon which the plaintiff was being conveyed in the

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performance of his duty as such employee, and without fault on his part. To the plaintiff's action the defendant pleaded the general issue of not guilty, and a special contract of the plaintiff by which he agreed to assume all risks incident to his employment. The defendant also pleaded that the alleged injury complained of was not done upon its road but upon the Nickajack Railroad, and therefore the defendant was not liable therefor. The defendant also pleaded a settlement made with the plaintiff, in the nature of an accord and satisfaction, for the injury complained of. On the trial of the case, the jury, under the charge of the court, found a verdict in favor of the defendant. The plaintiff made a motion for a new trial on the several grounds therein set forth, which was overruled by the court, and the plaintiff excepted.

1. The plaintiff's action is brought against the Western and Atlantic Railroad Company, a corporation in said county of Fulton, alleging that *that corporation* has damaged him \$5,000 00.

By the act of 1870, the Western and Atlantic Railroad is liable to be sued as a corporation in any county through which the road runs, for any cause of action to which it may become liable after the execution of the lease thereof. Although it is not alleged in what county through which the road runs, the injury complained of was done by the defendant to the plaintiff, it may be fairly inferred from the plaintiff's declaration, that he sue for an injury done to him by the defendant on its road, inasmuch as he alleges that the Western and Atlantic Railroad Company, a corporation of said county of Fulton, has damaged him \$5,000 00. But be that as it may, the defendant, as a corporation, was not liable to be sued by the plaintiff for the cause of action for which he complains, unless the injury was done him by the defendant on its road in some one of the counties through which its road runs. The defendant is liable for injuries done to co-employees on its road by the negligent conduct of its agents, and that is the legal effect of the plaintiff's suit. It is true that the plaintiff does not allege, in express terms, in his declaration, that the in-

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jury complained of was done on the defendant's road, but such is its legal effect, in view of the powers and liabilities of the Western and Atlantic Railroad Company as a corporation. The uncontradicted evidence in the record is, that the injury complained of was not done on the defendant's road, but on the Nickajack Railroad, a road over which the defendant had no control, so far as the evidence in the record shows.

2. The plaintiff sues the defendant, as a corporation, for damages for an injury done by it to him. The evidence is, that the injury complained of was done by another corporation having no connection with the defendant, and it is insisted by the plaintiff, that because the injury was done to him by that other corporation, that the instrument executed by him on the 14th of March, 1873, by which he agreed to assume all risks incident to his employment by the corporation of the Western and Atlantic Railroad, has no application, and constitutes no valid defense for the latter corporation. If the plaintiff is to be considered as having been injured on the road of the Nickajack corporation, for the purpose of avoiding his agreement with the Western and Atlantic corporation, on the ground that the former is a separate and distinct corporation, on what principle is it that the Western and Atlantic corporation is to be made liable for injuries sustained by the plaintiff on the road of the Nickajack corporation? It would seem that if the plaintiff was in the employ of the Western and Atlantic corporation when injured on the road of the Nickajack corporation, so as to make the Western and Atlantic corporation liable therefor, that his agreement with the latter corporation would be binding upon him; he cannot claim that he was injured on the road of the Nickajack corporation for the purpose of avoiding his agreement with the Western and Atlantic corporation, and at the same time seek to make the Western and Atlantic corporation liable for that injury. If the plaintiff was in the employ of the Western and Atlantic corporation at the time he was injured on the road of the Nickajack corporation, and the Western and Atlantic corporation is liable for that injury, then his agreement

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with the latter corporation, which was in evidence at the trial, would be a bar to his recovery. If, however, the plaintiff was in the employ of the Western and Atlantic corporation when he was injured on the road of the Nickajack corporation, and he was there with the train of the Western and Atlantic corporation by its consent and authority, still the plaintiff would not be entitled to recover under the evidence in the record. The plaintiff himself states that he went on the train at night, knew that the road was unsafe and dangerous, and told the conductor so; therefore, it was his fault to go on the train at night and take the risk, when he knew the road was unsafe and dangerous.

3. There was no error in the charge of the court to the jury in relation to the written agreement of the plaintiff. The court only stated to the jury what was the legal effect of the written instrument as it was his duty to have done, instead of shirking his responsibility off upon the jury in that respect. The court left it to the jury to say whether the plaintiff executed the instrument in writing, offered in evidence, and if he did, told them what was the legal effect thereof. What has, or has not been proved, is one thing; the legal effect of a written instrument when offered in evidence, is quite another and different thing. In any view which we have been enabled to take of this case, the verdict of the jury was right and we will not disturb it.

Let the judgment of the court below be affirmed.

BLECKLEY and JACKSON, Judges, concurred as set forth in the head-notes.

LEVY MEYERS, trustee, plaintiff in error, vs. FRANK M. MYRRELL, defendant in error.

1. A covenant by a lessee to place the premises in serviceable condition and repair, and to keep them so during his term, and, at the expiration of the term, to return them in like condition and repair, imposes the obligation to rebuild, if the stipulations of the covenant cannot be otherwise performed.

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2. A covenant to make any repairs required by the proper municipal authorities, for the safety or convenience of vessels lying at the demised wharf, is not broken by failure to make repairs ordered by such municipal authorities to prevent injury to the river.
3. When the deed of lease points out the repairs which the lessee is to make, as indicated in the two preceding notes, no additional duty of repairing or improving is cast upon the lessee by a stipulation in the same deed, that in no event is the lessor to be held bound or liable for, or chargeable with, any repairs or improvements, whatsoever, upon the premises; nor by the further stipulation therein, that all improvements put by the lessee, upon the premises, during the term, shall become the property of the lessor, without charge to him, and shall not be removed by the lessee. These provisions of the deed do not oblige the lessee to carry his repairs and improvements beyond what may be needed for "serviceable condition," and what may be required by the authorities for the "safety or convenience of vessels lying at the wharf."
4. There being, in the record, no sufficient evidence that the premises were ever out of "serviceable condition" whilst the lessee was under obligation to repair, or that any call upon him was made to repair for the "safety and convenience of vessels," the verdict of the jury was correct, and the motion for new trial was properly denied.

Contracts. Lease. Landlord and tenant. Before Judge TOMPKINS. Chatham Superior Court. February Term, 1876.

Arnold, trustee, brought assumpsit against Myrrell, on the covenants contained in a deed of lease of a certain wharf in the city of Savannah. The declaration contained two counts, the first upon the following covenant, and its breach :

"1st. And the said party of the second part doth also covenant for himself, his heirs, etc., to place said demised premises in serviceable condition and repair, and to keep them in such serviceable condition and repair while he continues to occupy the same and during the continuance of this lease, and to return the same to the said party of the first part, his executors, etc., in such serviceable condition and repair at the end and expiration of this lease."

2d. The second count was upon the following covenant, and its breach :

"And that any repairs required by the commissioners of pilotage for the safety or convenience of vessels lying at said

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wharf, shall be made and completed by the said party of the second part at his own proper charge, and that in no event shall the said party of the first part, during the continuance of this lease, be held bound, or liable for, or charged with any repairs or improvements whatsoever upon the said demised premises."

Damages were laid at \$5,000 00.

The defendant, besides the general issue, pleaded that the wharf had been rebuilt instead of being repaired, and he was not liable therefor under his two covenants.

On the trial, the plaintiff introduced the following evidence:

1st. The lease containing the covenants, which also provided that all improvements put by the lessee upon the premises during the term should become the property of the lessor, without charge to him, and should not be removed by the lessee.

2d. A certified copy of an order from the mayor and aldermen of Savannah, acting as commissioners of pilotage, which was substantially as follows: "That the owners of the wharf should, within thirty days, begin, well and sufficiently, according to the opinion of the surveyors duly appointed, to repair, and with reasonable diligence continue to repair, such wharf, which, in the opinion of said surveyors, 'should be repaired to prevent injury to the river.'" The following extract from the report of said surveyors describes the wharf referred to: "Goodwin & Meyers' wharf needs a number of additional piles, new cap logs, joist flooring. It should be rebuilt."

3d. Proof of notice sent by plaintiff to defendant, enclosing a copy of the order and requiring defendant to obey the same; proof that the latter failed to do so, and subsequently plaintiff repaired, in conformity to the order, to the extent of substantially rebuilding; that this was done as cheaply as possible; that the cost to plaintiff was \$3,129 00; and that by reason of the condition of the wharf when the order of the city authorities was given, it could not have been substantially repaired without being rebuilt.

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The evidence for defendant was, in brief, as follows: The wharf was an old one when the lease began, but was in a serviceable condition for the uses to which it was generally applied. Defendant had repairs made from time to time, keeping it "in serviceable condition," and left it in as good condition generally as when he received it.

The jury found for defendant. Plaintiff moved for a new trial, on the following, among other grounds:

1st. Because the court charged, substantially, as to each of the two covenants, that the obligation imposed on defendant did not include re-building the wharf—that "repairing does not mean re-building," and refused to charge the contrary.

2d. Because the verdict was contrary to law and evidence.

The motion was overruled, and plaintiff excepted.

Whilst the case was pending before the supreme court, Arnold died, and Meyers, his successor, was made a party plaintiff in his stead.

WEST & CUNNINGHAM; A. T. AKERMAN, for plaintiff in error.

A. B. SMITH, for defendant.

BLECKLEY, Judge.

We recognize the doctrine that the tenant must perform his covenant, though to do so may involve re-building. But this case had a proper result, inasmuch as, according to the evidence, or to the decided weight thereof at least, no breach of the covenant occurred. It was not made to appear, by a preponderance of evidence, that the wharf was not kept and returned in "serviceable condition." Neither was it made to appear that any repairs were called for by the municipal authorities "for the safety or convenience of vessels lying at the wharf." It would be an unwarrantable expansion of the covenant to hold that repairs demanded for the broad purpose of "preventing injury to the river," were to be made by the tenant in addition to those for which he expressly stipu-

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lated. The repairs which he engaged to make were those only that were necessary for the objects distinctly specified. On the obligation to perform, even to the extent of re-building: See 6 Term, 650; 3 Vesey, 34; 4th Camp., 275; Shep. Touchs., 173; 3 Saunders, 422, *n. 2*; 4 McCord, 431; 3 Denio, 294; 5 Barb., 666; 22 Ala., 382; 35 Miss. R. 618; Comyn L. & T., 202; Taylor L. & T., sections, 357, 360, 364; 16 Mass., 238; 3 Kent Com., 467, 468; Chitty on Contracts, 336; Broom's Maxims, 233; 35 Cal., 416.

Judgment affirmed.

A. C. TUGGLE, plaintiff in error, *vs.* JOHN W. TUGGLE, administrator, defendant in error.

1. Upon the trial of an issue whether a conveyance of land made by a father to a son shortly before his death, for an alleged consideration of \$500 00, and natural love and affection, of which the son had been in possession for many years before such conveyance without payment of rent, was intended as an advancement, or a gift for love and affection, or a sale upon a valuable consideration, it was competent to show that the father returned the land, and paid taxes thereon, for the year in which the conveyance was made, and prior thereto.
2. It was also competent to show what was the value of the father's estate at the time of the conveyance. This fact, taken in connection with the number of his children, tended to illustrate his intention.

Advancement. Evidence. Before Judge PEEPLES. DeKalb Superior Court. March Term, 1876.

Reported in the decision.

L. J. WINN, for plaintiff in error.

CANDLER & THOMSON, for defendant.

WARNER, Chief Justice.

This was an appeal from the court of ordinary of DeKalb county. On the 13th of May, 1871, Lodwick Tuggle, a short

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time prior to his death, executed and delivered a deed conveying a certain described tract of land to his son, A. C. Tuggle, for and in consideration of the natural love and affection which he had and bore to his said son, and in and for the consideration of the sum of \$500 00 cash in hand paid by the said A. C. Tuggle, the receipt whereof is hereby acknowledged, etc. The question in issue for trial between A. C. Tuggle and the administrator of Lodwick Tuggle, was whether the conveyance of the land by the intestate, was intended as an advancement to his son, or whether he intended to convey to him the absolute title to the property, either for natural love and affection, or for a valuable consideration. On the trial of that issue, the jury, under the charge of the court, found a verdict in favor of the administrator, that it was an advancement. The plaintiff, A. C. Tuggle, made a motion for a new trial on various grounds, which was overruled by the court, and the plaintiff excepted.

It appears from the evidence in the record that the plaintiff had been living on the land since the year 1856, up to the time of making the deed by his father to him in 1871, without the payment of any rent therefor. The evidence as to the intention of his father in making the deed in 1871, was conflicting. There is evidence in the record which would have authorized a verdict for either party.

1. There was no error in admitting the witness, Jones, to testify that the deceased intestate gave in and paid tax on the land prior to, and including the year 1871. Whether the objection was made on the ground that there was higher and better evidence of the facts sought to be proved, does not appear. The evidence was relevant to the issue on trial, in view of the proven facts of the case.

2. There was no error in admitting in evidence what was the value of the deceased intestate's estate at the time the deed was made. That evidence, when taken in connection with the proven number of his children, was a circumstance going to show what might have been the probable intention of the intestate in making the deed to the plaintiff. An ad-

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vancement, is any provision by a parent to, and accepted by, a child out of his estate, either in money or property during his lifetime, over and above the obligation of the parent for maintenance and education. Donations from affection, and not made with a view of settlement, nor intended as advancements, shall not be accounted for as such: Code, section, 2579. Whether the deceased intestate, when he conveyed the tract of land to his son, in view of all the facts and circumstances connected with the transaction, as shown by the evidence, intended it as an advancement, was the question for the jury to decide. In submitting that question to the jury, under the evidence in the record, we find no error in the charge of the court, or in refusing to charge as requested.

Let the judgment of the court below be affirmed.

JOHN A. BULLARD, executor, plaintiff in error, *vs.* JESSE A. LEAPTRON *et al.*, defendants in error.

When a younger *fi. fa.*, by process of garnishment, brings money into court, and an older judgment takes all the money, the expense of bringing in the fund, including reasonable counsel fees, should be paid out of the fund, and all expenses, as well as the net sum realized by the older judgment, should be credited on the older *fi. fa.* The younger judgment, realizing no part of the fruit of its diligence, should pay no part of the expense. It is bad enough to lose all the fruit of its enterprise and see another consume it; it would be too bad to make it pay for that from which it realized nothing; no part of the expenses should, therefore, be credited on the younger *fi. fa.*

Judgments. Executions. Garnishment. Before Judge JOHNSON. Washington Superior Court. September Adjourning Term, 1875.

Reported in the opinion.

E. W. CULLEN; LANGMADE & EVANS, for plaintiff in error.

Bailey *vs.* Simpson *et al.*

No appearance for defendants.

JACKSON, Judge.

Leaptrot held a younger judgment against one Riddle, and by process of garnishment brought \$650 00 into court. Bullard held an older judgment and claimed the money on it. The court directed the money to be paid to his *fi. fa.*, after paying all expenses, including \$100 00 attorney's fees, and ordered the whole sum, fees and all, to be credited on the older *fi. fa.* Bullard excepted to all expenses being credited on his *fi. fa.*, but insisted that the younger *fi. fa.*, which brought in the money but realized nothing, should be credited with its part, *pro rata*, of expenses.

We think that the court did right. The statute is plain—Code sec. 3545—and the sense of the law equally plain. Bullard has reaped where he did not sow; indeed, he has gathered in his barn what he neither sowed, reaped or otherwise labored for. Surely he ought to pay the laborer, and not insist that the younger *fi. fa.*, which got nothing, should pay any part. Its *pro rata* of expense is nothing, because it got nothing.

Judgment affirmed.

DAVID J. BAILEY, next friend, plaintiff in error, *vs.* HAMILTON SIMPSON, sheriff, *et al.*, defendants in error.

1. If a deed by a husband to his wife, executed in 1852, vested in her, any separate estate, the same, upon her death, descended to him as her sole heir-at-law, unless she died after the law of inheritance was changed by the act of 1871-2: Code, section 2484.
2. A child claiming to share with the husband in such estate, must show, affirmatively, that the descent was cast after the law was so changed.
3. Where the remedy against an impending sale is complete by the interposition of a claim, injunction is needless, and the bill is demurrable.
4. Where injunction is sought on the ground of irremediable injury, a state of facts likely to occasion such injury must be averred.

Bailey *vs.* Simpson *et al.* .

Deeds. Inheritance. Equity. Injunction. Before Judge HARRIS. Camden Superior Court. April Term, 1876.

Bailey, as next friend of J. A. Dufour, a minor, filed his bill, making, in brief, the following case:

Mary R. Dufour was possessed, by inheritance from her father, (John Bailey,) and by deed of trust from her husband, A. B. Dufour, of an undivided third interest in a certain described lot of land in Camden county, known as the Woodbine plantation. By her death, this property passed to her minor son, J. A. Dufour, as her heir-at-law, and he now holds as tenant in common with the other heirs of John Bailey, deceased. On June 10th, 1873, a mortgage *f. fa.* in favor of one Wm. Royal against A. B. Dufour, was levied by the sheriff on the aforesaid one-third interest, and it is now advertised for sale. Complainant therefore alleged that he has no adequate remedy at law, that the injuries resulting will be irremediable, and prays for injunction to prevent the sale of the land, and for general relief.

Exhibit "A," contained a copy of the *f. fa.*, with the entry of levy thereon. The *f. fa.* recited that it was issued on the foreclosure of a mortgage on the land by A. B. Dufour to William Royal, dated June 1st, 1868.

Exhibits "B" and "C," contained respectively the notice of levy to tenant in possession and the advertisement of the sale.

Exhibit "D," contained an ordinary deed of gift from A. B. Dufour to his wife, Mary R. Dufour, dated December 3d, 1852. This instrument, after conveying certain other property, proceeds, "Also, all his right, title and interest to, and in that tract or parcel of land situated, lying and being on the Satilla river, known as the Woodbine plantation, and the slaves and improvements thereon, the same being the one-quarter interest in said tract or parcel of land, slaves and improvements aforesaid, being the property of the heirs of John Bailey, deceased, of said county, and state," etc.

Defendants demurred to this bill on the two grounds: 1st,

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For want of equity. 2d. Because the bill was inconsistent with itself; it alleged that Dufour made a trust deed to his wife, but set out an ordinary conveyance from husband to wife which was void at the time when made.

The demurrer was sustained and complainant excepted.

S. W. HITCH; J. C. NICHOLS, by L. J. GLENN & SON, for plaintiff in error.

No appearance for defendants.

BLECKLEY, Judge.

Grant that the deed by husband to wife passed title, the title returned to the husband when the wife died, as the law of inheritance formerly stood. It does not appear that the wife died after the law was changed, and the burden of making this appear was on the complainant. Moreover, if the complainant had title, it could have been asserted by the interposition of a claim—there was no need for injunction. The allegation that, without injunction, the complainant's injury would be irremediable, is of no value, for a state of facts is not presented from which such injury is likely to accrue. For aught that appears, all apprehended injury might be prevented by interposing a claim in the usual statutory method.

Judgment affirmed.

LANGMADE & EVANS, plaintiffs in error, *vs.* OTTAWAY B. GLENN *et al.*, defendants in error.

1. When attorneys are ruled by their clients for money collected, and not for failing to collect, they cannot be held to answer, on that rule, for more than the sum actually collected.
2. In the present case, the attorneys fully accounted for all the money they received, and the verdict against them was not supported by the evidence, as applied to the rule *nisi*.

Langmade & Evans vs. Glenn et al.

Attorney and client. Rule. New trial. Before Judge JOHNSON. Washington Superior Court. November Ad-journed Term, 1875.

Ottaway B. Glenn and James S. Hook, as administrators of William Glenn, deceased, ruled Langmade & Evans, as attorneys at law, for money alleged to have been collected by them, on an execution in favor of movants against Susan S. Adams, as administratrix of Jordan S. Adams, deceased, and John J. Adams, administrator of Benjamin Adams, deceased, security, for \$1,981 00, with interest from March 6th, 1861. The answer of Langmade & Evans presented the following facts :

In the year 1865, Ottaway B. Glenn placed in respondents' hands, for collection, a note for \$1,980 00, signed by Jordan S. Adams, as principal, and Benjamin Adams, as security, both of the makers being dead, the estate of the latter being unrepresented, or the twelve months from his death having not yet expired, so as to authorize suit. Judgment was recovered against the estate of the principal, and a levy made, out of which tedious litigation arose, which resulted in a decision of the supreme court adverse to the claim represented by respondents. Thus all hope was cut off of ever realizing anything from the estate of the principal. Suit was then instituted and judgment recovered against the estate of Benjamin Adams. A homestead was taken out for the minor children, which covered the entire property.

In the year 1866, one James J. Kennedy placed claims in respondents' hands for collection against said Ottaway B. Glenn, amounting to about \$1,000 00. These debts being about to be sued, said Glenn proposed to take up the same by the transfer to Kennedy of the claim on the Adams' estates as collateral security. The proposition was accepted, Glenn's notes given up, and the transfer made.

In the year 1867, respondents represented claims against Glenn in favor of James Burns, amounting to more than \$1,006 00, upon which judgment had been obtained. Glenn

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proposed to transfer the claim against the Adams estates, in satisfaction of this indebtedness. The proposition was accepted, the obligations on Glenn surrendered, and the transfer made.

After seven years of litigation, with very little prospect of success in realizing thereon, respondents, with the full concurrence and approbation of Glenn, effected a compromise of the claim against the Adams' estates, by which they realized \$1,550 00 in cash, and an execution against said Glenn, amounting to \$907 00. The money thus realized has been appropriated to the claims of Kennedy, and Burns, after deducting counsel fees due to respondents by said parties.

Respondents claim that said Glenn is indebted to them \$500 00 for professional services for which they pray judgment.

A traverse was filed to this answer, and the issue thus formed was submitted to a jury.

The only material point upon which the evidence was conflicting was as to the authority of respondents to make the compromise which was effected with the Adams' estates, and under the decision this question was not properly before the superior court in the then state of the pleadings.

The testimony showed that all the money collected under the aforesaid compromise had been paid over to the assignees of Glenn, less one-half thereof retained by respondents, under contract with such assignees for fees.

The note upon which the judgment against the Adams' estate was obtained, was payable to James S. Hook and O. B. Glenn, administrators *de bonis non*, or bearer. It was sued in the name of Glenn, as bearer.

The jury found for plaintiffs \$275 00, with interest from time of settlement; they also found that the attorney's fees had been paid. The respondents moved for a new trial upon numerous grounds, which may be condensed into the one that the verdict was against the law and the evidence. The motion was overruled, and respondents excepted.

Langmade & Evans *vs.* Glenn *et al.*

R. W. CARSWELL; LANGMADE & EVANS, for plaintiffs in error.

HOOK & WEBB, for defendants.

BLECKLEY, Judge.

1. When a rule is brought, as this was, for money collected, the actual collection measures the amount to be accounted for. When, on the other hand, the complaint is of neglect of duty in failing to collect, the measure of liability is what might have been collected by the use of due diligence: *7 Georgia Reports*, 144. There may be some doubt whether, under the Code, (see section 3946, *et seq.*.) the remedy by rule is available in the latter case at all, or whether the failure to exercise diligence is not matter to be redressed by action only. But assuming both matters to be equally cognizable by rule, doubtless both might be joined in the same rule; that is, the attorneys could be proceeded against at the same time and by the same process to compel them to pay over so much as had been collected, and to respond for their failure to collect more. But here there is, on the face of the rule *nisi*, no intimation of any default except withholding the money collected. If the evidence before the jury showed a legal and rightful application of that money, the rule was well answered and should have been discharged. It will not do to sue, by rule or otherwise, for one thing and recover for another. The records of a court of record must show what causes of action have been litigated. Such records frequently become important evidence in other proceedings. Thus, this very rule, with the verdict and the judgment thereon, might possibly be introduced on the trial of an indictment against the attorneys for larceny after a trust delegated.

2. Confining the rule to the matters of complaint alleged in it, the uncontradicted evidence was, that the attorneys had accounted with certain creditors of Glenn for all the money realized, and that these creditors held debts more than sufficient to absorb it, which debts were secured by Glenn's assignment

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of the Adams claim as collateral security. The money was the produce of the Adams claim, and the creditors who controlled the claim as collateral, had, by reason of the assignment, Glenn's authority to receive it. Their right to it was what his had been before the assignment was made, and as no point was made upon his authority to pledge the claim to secure his individual debts, (that position being conceded in the argument) payment to his assignees should work the same discharge to the attorneys as payment directly to him. The assignees having given Glenn credit for the whole sum received, and remitted a balance still in their favor, it was no injury to him that they allowed to their own attorneys one-half of the money as fees. That these attorneys were the same persons who, as attorneys for Glenn or for Glenn and Hook, raised the money, makes no difference. There is no incompatibility in representing the owner of a claim and those to whom the owner has assigned it, while in process of collection, as security for admitted indebtedness.

If Glenn assented to the compromise by which the money was realized, he has no cause to complain, for all that was realized has been accounted for. If he did not assent to it, proper allegations can be made in the appropriate proceeding, and the real case, according to the facts, be presented for trial. As it is, we have a rule for not paying over money collected; all the money collected was realized by a certain compromise; that compromise is repudiated by those who have brought the rule.

Judgment reversed.

**B. G. TRAYNHAM, plaintiff in error, vs. PERRY & DENTON,
defendants in error.**

When the case purports to be a claim case, but no claim affidavit or bond is found in the record, this court cannot reverse the judgment of the court below declaring the property subject, more especially, where that judgment, though mentioned in the bill of exceptions, is not sent up as a part of the record.

Traynham *vs.* Perry & Denton.

Practice in the Supreme Court. July Term, 1876.

Reported in the opinion.

CRAWFORD & WILLIAMSON, by brief, for plaintiff in error.

D. B. SANFORD, by Z. D. HARRISON, for defendant.

BLECKLEY, Judge.

Whoever becomes a plaintiff in error undertakes to produce in this court a judgment, and to prove it erroneous by the record and the law applicable thereto. To the record of a claim case, the affidavit and usually the bond prescribed by statute, are essential. Without these, certainly without the former, it would be impossible for the so-called claimant to have any legal judgment in his favor, either here or in the court below. Whatever reason might be given for ordering the execution to proceed, the order would be right, and should not be disturbed. The record before us is certified by the clerk to be complete. There is no suggestion by either party that it is not so. It, however, contains no affidavit or bond, and thus, according to it, the plaintiff in error had no right to arrest the progress of the execution against the property under levy. A further defect in the record is, that the order or judgment complained of is not set forth as a part of it. Tested by the record, there is nothing to reverse. The bill of exceptions, it is true, states that a judgment was rendered, but if so, why is it not produced? The office of the bill of exceptions is to supplement the record, not to supply it. A judgment of the superior court is matter of record, and must appear in this court by the transcript, under the clerk's certificate, in order to obtain a reversal.

Judgment affirmed.

Harrison *vs.* McClelland.

DANIEL T. HARRISON, administrator, plaintiff in error, *vs.*
MAHALABLE A. MCCLELLAND, defendant in error.

1. The maker of a promissory note is bound personally, though the word "administratrix" be annexed to her signature.
2. The surrender of promissory notes made by the intestate, is a sufficient consideration to support a personal or individual note given by the administratrix to the creditor : *25 Georgia Reports, 242.*
3. Though the notes surrendered were due prior to June 1st, 1865, as the note given by the administratrix in lieu thereof was dated and due in 1867, the statute of limitations of 1869 does not apply to it; and suit brought in 1875, was in time, the note being under seal.

Administrators and executors. Contracts. Promissory notes. Statute of limitations. Before Judge TOMPKINS. Bulloch Superior Court. March Term, 1876.

On February 27th, 1875, Harrison, as administrator of Ninian Drummond, brought complaint against Mrs. McClelland, formerly Mrs. Edwards, on the following note :

"CHARLESTON, S. C., December 29th, 1867.

"Two days after date I promise to pay to Ninian Drummond, or order, at Charleston, South Carolina, the sum of \$326 38, for value received.

"Witness my hand and seal.

(Signed) "MAHALABLE A. EDWARDS, [L. S.]
" \$326 38. *Administratrix.*"

The defendant pleaded the statute of limitations ; that the note was not given by her individually, but as the administratrix of John P. Edwards ; and that it was given without consideration of any kind moving to her, but merely in renewal of old notes made by her intestate during his life, dated and due before June 1st, 1865.

The evidence made the case presented by the two last pleas above set forth.

The jury found for the defendant. The plaintiff moved for a new trial upon the following grounds :

1st. Because the court erred in charging the jury as fol-

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lows: "If you believe from the evidence that the note sued on was made and signed by the defendant as administratrix upon the estate of John P. Edwards, and for no new consideration, but in lieu of certain other notes due by her intestate in his lifetime, and payable before June 1st, 1865, then she is liable (if liable at all on such note) as administratrix, and there can be no recovery against the defendant in her individual capacity."

2d. Because the court erred in charging, that if the note sued on was given in renewal as above stated, and suit was not brought thereon before January 1st, 1870, it would be barred by the statute of limitations.

3d. Because the verdict was contrary to the law and the evidence.

The motion was overruled and the plaintiff excepted.

A. B. SMITH, for plaintiff in error.

RUFUS E. LESTER, for defendant.

BLECKLEY, Judge.

The law of the case is presented with sufficient fullness in the notes read from the bench. The plaintiff in error cited Story on Prom. Notes, section 63; 1 Parsons on Notes and Bills, 161; 39 *Georgia Reports*, 130; *McFarlin vs. Stinson*, 56 *Ibid.*, 396; Acts of 1869, p. 133; 51 *Georgia Reports*, 107; 50 *Ibid.*, 382; *Calloway vs. West*, July Term, 1876; 49 *Ibid.*, 431; 50 *Ibid.*, 382; Code, section 2915; 16 *Georgia Reports*, 382; 29 *Ibid.*, 700; Code, section 5; 12 *Georgia Reports*, 459; 44 *Ibid.*, 128; Code, section 2724. The defendant in error cited 1 *Ves. Sen'r.*, 126; 3 *Bur.* 1890; 2 *Williams on Executors*, 1512, 1514; 1 *Saunders*, 210; 9 *Wend.*, 273.

Judgment reversed.

The Life Association of America *vs.* Waller.

THE LIFE ASSOCIATION OF AMERICA, plaintiff in error, *vs.*
SUSANNAH M. WALLER, defendant in error.

The act of self-destruction by a person who is insane at the time, without fault on his part, is not suicide, in any proper sense, if the insanity be of such character and degree as to free the act from all immorality, and leave the actor entirely blameless.

Insurance. Suicide. Contracts. Before Judge TOMPKINS.
Chatham Superior Court. February Term, 1876.

Mrs. Waller sued out an attachment against the Life Association of America, based on a policy of insurance on the life of her husband, A. R. Waller.

On the trial, the evidence made, in brief, the following case:
Waller's life was insured by defendant, for the benefit of his wife or other legal holder of the policy, in the sum of \$5,000 00. One of the conditions of the policy was that "if the insured shall die by suicide during the continuance of this policy, said Life Association will pay to the legal holder of this policy its net present value at the date of such death, as computed by the American Experience Table of Mortality, and four and one-half per cent. interest." On May 31st, 1875, he died by his own hand, shooting himself in the head with a pistol. In the opinion of witnesses, who knew him well and saw him frequently just before his death, he was insane at that time. The evidences of insanity were numerous; he was alternately melancholy, excited and abstracted; would interrupt conversations by complaints of his troubles, his failure in planting and his disgrace, though, in fact, his planting was generally successful, his financial condition prosperous, and his social and business relations pleasant. Sometimes he seemed unconscious of the presence of others. He frequently said that he was in great pain and could not live long. Two or three weeks before his death, he sent for a friend, stated his expectation of death and asked that the latter would assist his wife in winding up his affairs, though he seemed in no danger. In the course of the conversation,

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he said that he had dyspepsia, but the real trouble was "here," (touching his head) and that there was something wrong on his mind; afterwards he burst into tears without apparent cause. Twice in conversation, when the subject of self-destruction was mentioned, he expressed his abhorrence of it; one of these conversations was within an hour of his death. From Saturday, May 29th, to Monday the 31st, he seemed much disturbed, scarcely ate or slept, was very restless and melancholy. On Saturday night he became frightened by a note which he had received from his employer in regard to one of the plantations which he was managing, had his buggy brought out, and in company with a friend started at a furious pace to the plantation. On the road he changed his mind, and returned home with equal speed. Next morning this friend and another (both being at Waller's house) were discussing the state of his mind and the necessity of having him watched, when he came into the room, and dropped into a chair, saying, "My God! I cannot stand this thing; it will kill me." Soon after, in company with one of these parties, he drove to the plantation several miles distant, making an appointment to meet the other the same evening. On the road he expressed to his companion the belief that it would be his last ride. The latter said that he saw no reason why it should be so, unless Waller died by his own hand. He thereupon said that would never be. In less than an hour after, they arrived at the plantation; Waller lay down on a bed; his companion left him for a moment, heard a pistol-shot, returned and found Waller with a pistol in his hand, and shot through the head. His physician testified that he was subject to malarial fever and dyspepsia, and that the latter disease may produce insanity.

Evidence was also introduced to show that the net value of the policy, computed by the American Experience Table, was \$109 62.

The jury found for the plaintiff \$5,000 00. Defendant moved for a new trial on the following, among other grounds:
1st. Because the verdict was contrary to law and evidence.

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2d. Because the court admitted evidence of Waller's insanity.

3d. Because the court charged that "if the jury find from the evidence that A. R. Waller died by his own hand while in a fit of insanity, they must find for the plaintiff in the amount of the policy."

The motion was overruled, and defendant excepted.

JACKSON, LAWTON & BASSINGER, for plaintiff in error.

WEST & CUNNINGHAM, for defendant.

BLECKLEY, Judge.

The Code (section 2822) and the contract alike declare that suicide shall make the policy void. What is suicide? The meaning of a word depends less upon a derivation than upon usage. The former indicates what, according to sound scholarship, the word ought to mean, but the latter determines more directly what it does mean. A word may be more comprehensive or less comprehensive than the term or terms from which it was derived. It may drop attributes which they included, or grasp some which they did not include. Again, many words are used, sometimes in a proper, and at other times in an improper sense, both of them well sanctioned by custom. Thus, we say that an idiot cannot make a will; and that the will of an idiot is void. In the first of these propositions, the word *will* includes all the attributes requisite to validity; in the second it does not, for otherwise the so-called will could not be void. A will in the latter sense is no will in the former. A somewhat similar diversity exists in the use of the word *suicide*; and hence it is almost, if not quite, an allowable expression to say, that the suicide of A was not suicide. The real question is, which is the proper, and which is the improper sense of the term? Johnson's dictionary defines it thus: "Self-murder, the horrid crime of destroying one's life." Walker's dictionary gives exactly the same definition. Webster's dictionary defines it thus: "The act of

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of years of discretion, and of sound mind; self-murder." The Encyclopaedia Britannica calls suicide "The crime of self-murder." The Encyclopaedia Americana, under the word homicide, says: "The act of suicide is considered by the law to be murder, and the person making away with himself is accordingly styled a self-murderer." Lord Coke says, "If a man kills himself by the rage of sickness or infirmity, he is not *felo de se*; for he cannot commit murder upon another, so in that case he cannot commit murder upon himself." 3 Inst., 54. Hale says: "*Felo de se* or suicide is, where a man of sound mind, and of discretion, and *compos mentis*, voluntarily kills himself; therefore, is he that deliberately puts an end to his life, or commits any unlawful, malicious act, the consequence of which is his own death. * * The party must be of sound discretion, and in his senses, else it is no crime." 4

We have quoted furnishes strong evidence that suicide, both in ordinary and legal language, is something between self-right and self-inflicted death. It is a species of ~~recklessness~~—something wrong; a kind of self-murder. The man forms the purpose of making his last will. He equips himself with proper materials for writing, and commits his testamentary scheme to paper; signs it in the presence of witnesses, and has it duly attested. Now what he desired and designed to do, and, in this case, voluntarily; but what is the result? He has made a sealed will, but no real will. Being without ~~any~~ ~~more~~ capacity, what he has executed is no more than a mere ~~will~~ ~~testament~~ than the pen with which it was written. It is evident that the unfortunate man is so far gone in his infirmity, and of electing between them in such a ~~moment~~ ~~time~~ that his moral agency is thus suspended, he can make no disposal of his property by

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will, he will dispose of his life by suicide. He selects a fit instrument for his purpose, and uses it fitly, just as he did in respect to the materials for writing. Though by reason of his malady he knows nothing of good and evil, he can still apply the law of cause and effect. He remembers that a loaded pistol may be discharged by pulling the trigger, and that a bullet in the brain will produce death. With a distinct purpose to kill himself, a purpose as easily formed, perhaps, in particular cases of insanity, as the intention to take food or drink, nay, in some cases it may be impossible not to form it, he fires the fatal shot and dies. The result is a so-called suicide, but not a real one. The physical properties are all present, but the essential moral property is absent. The solemn writing—the signing, sealing and attestation are complete, but there is no will. It might as well be decided that the pistol murdered the man, as that he committed "self-murder, the horrid crime of destroying one's life."

In suicide, proper, there must be a moral element, and the presence of that depends upon whether the man is so far rational as to be able to discern the difference between right and wrong. If, from disease or misfortune, he is so utterly irrational as to be equally innocent with or without attempting the forbidden violence, he is not a moral agent, and his act is that of a mere animal that has lost the instinct of self-preservation. Would it be suicide for a sleeper to dream of death, to desire, in his dream, to die, and to gratify the desire by carefully, while still asleep, selecting and applying appropriate means for the destruction of life? In insanity, the reason sleeps while the body wakes; and the reason is the man.

We are aware that there is a strong current of modern decision, both English and American, against applying any moral test whatever to cases of alleged suicide, in the law of life insurance. But we believe that the true doctrine was announced by the Supreme Court of the United States, in *Life Insurance Company vs. Terry*, 15 Wall., 580. See, also, 8 New York, 299; 7 Heiskell, 567; 26 La. An., 404; 55 *Georgia Reports*, 103; 41 *Ibid.*, 338.

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The law of the main question being as above indicated, the verdict of the jury was what it ought to have been under such convincing evidence as the record contains. This view controls the case, and ends it.

Judgment affirmed.

**ORVILLE BARBER, plaintiff in error, *vs.* ELISHA S. TERRELL,
defendant in error.**

The discovery of evidence which is merely cumulative, and which would not even probably change the result, does not make such an extraordinary case as would warrant the sustaining of a motion for a new trial made after the adjournment of the court at which the judgment was rendered.

New trial. Evidence. Before Judge BARTLETT. Greene Superior Court. March Term, 1876.

Reported in the decision.

E. C. KINNEBREW, for plaintiff in error.

JAMES L. BROWN; P. B. ROBINSON; W. H. BRANCH; M. W. LEWIS, for defendant.

WARNER, Chief Justice.

This was a motion for a new trial under the provisions of the 3921st section of the Code, as being an "extraordinary case." It appears from the record and bill of exceptions, that the claim case between the parties was tried in the superior court of Greene county, and that the property levied on was found subject to the plaintiff's execution. The case was brought to this court by writ of error, and at the January term thereof, 1875, the judgment of the court below was affirmed: See *Barber vs. Terrell*, 54 *Georgia Reports*, 146. At the March term of the court, 1876, the claimant made a motion for a new trial on the ground that since the former trial of the case, and since the affirmance of the judgment

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therein by this court, that certain notes have been found which were referred to on the former trial, given by the defendant in *fl. fa.* to the claimant, on which there was a credit of \$2,500 00, which, it is alleged, was the consideration for the house and lot in dispute. It appears from the record of the evidence on the former trial, that the claimant was allowed to offer, and did offer, testimony in relation to the notes now alleged to have been found since the trial, as well as to the \$2,500 00 credit thereon, as the consideration for the house and lot in controversy, so that the newly discovered testimony would be merely cumulative of that which was introduced on the former trial of the case. Besides, if the notes now found with the credit thereon, had been introduced on the former trial, instead of proving the contents thereof, it is not even probable that it would have produced a different result in view of the other evidence in the record.

Let the judgment of the court below be affirmed.

BURRELL, GARDNER, trustee, *et al.*, plaintiffs in error, *vs.*
E. C. GRANNISS, administrator, defendant in error.

(JACKSON, Judge, having been of counsel, did not preside in this case.)

1. After service, appearance, and pleading to the merits, with no other plea, it is too late, at the trial, for the defendant to make objection to the manner in which he has been brought into court, or to the jurisdiction of the court over his person.
2. After the sole defendant in an action of ejectment has died, and another defendant has been brought in, and has pleaded to the merits, the action may proceed as to the latter, without making the representatives of the former a party.
3. When one of the parties to a special or collateral issue, tried during the pendency of the main case, is now dead, and his representatives are not before the court, the supreme court will not, on a writ of error brought by a person who was not then a party to the case, examine the proceedings had upon the trial of that issue.
4. The verdict on an issue of forgery, made up and tried under the Code, section 2712, is no evidence against a defendant subsequently made a party to the ejectment at the instance of the plaintiff; more especially, if

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- the plaintiff proceeds against the new defendant for *mesne* profits, as well as for the premises in dispute.
5. An affidavit which was used in the cause, in connection with the issue of forgery, by the original defendant, cannot, solely because it was so used, be read to the jury to affect a defendant who was not then a party, and who did not become a party voluntarily.
 6. A witness who read an original record before it was destroyed, may testify that a defective probate (such as now appears on the deed itself) was upon the record; notwithstanding an official copy, made from the record before destruction, sets forth the deed as recorded without any probate annexed.
 7. Where both parties claim to have derived title from the same person, the plaintiff through a deed from him, and the defendant through a deed from his administrator, and where the defendant attacks the plaintiff's deed as a forgery, the last will of such person, duly probated, which disposes of other lands but makes no disposition or mention of the land now in question, is admissible in evidence for the plaintiff, as tending to show non-claim by the testator; the will bearing date later than the deed in controversy. That the will does not expressly declare the intention of the testator to dispose of all of his estate, weakens its force as evidence, but does not render it wholly inadmissible.
 8. A deed more than thirty years old at the time of trial, is an ancient document, though it was under thirty when the suit was commenced. Such a deed, fair on its face, coming from the proper custody, with a defective probate by one of the subscribing witnesses, whose handwriting, in his attesting signature to the deed itself, is proved to be genuine, and with an entry of recording on the deed (also proved to be genuine) made by the clerk who was in office at the time the entry bears date, which date is more than thirty years anterior to the trial, is admissible in evidence, though the other attesting witness is still alive and accessible, and is not examined by the party offering the deed, and though no actual possession of the land under the deed was ever held, the land having been vacant when the deed purports to have been executed, and having remained vacant for nineteen years thereafter.
 9. If a deed essential to the plaintiff's title is a forgery, the verdict should be for the defendant.
 10. Any circumstance which would place a man of ordinary prudence fully upon his guard, and induce serious inquiry, is sufficient to constitute notice of a prior unrecorded deed. And a younger deed, taken with such notice, acquires no preference by being recorded in due time.
 11. Where a person claiming to be the owner is brought in as defendant to an action of ejectment which was instituted originally against his overseer or tenant then in actual possession, prescription, as a defense to that action, is measured by the length of possession prior to the suit, without adding the time that elapsed from then till the landlord was made a party.
 12. A defendant in ejectment is not liable for *mesne* profits taken, prior to his own entry, by those under whom he claims; but if, in accounting for the

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- profits chargeable to himself, he claims credit for improvements made by his predecessors, such improvements must first answer for the profits taken by those who erected them.
- 13. Where the statute of limitations as to *mesne* profits (Code, section 3058; *46 Georgia Reports*; 120,) is not pleaded, the account may be taken for the whole period during which the defendant has been in perception of the profits as against the plaintiff's title.
 - 14. *Mesne* profits will not be denied the plaintiff solely because the defendant, by clearing and improving the premises, has made the premises more valuable than they were when he entered.
 - 15. Unless a request to charge is all legal and pertinent, the court is not bound to give any part of it.

Ejectment. Practice in the Superior Court. Pleadings. Waiver. Parties. Practice in the Supreme Court. Evidence. Will. Ancient documents. Deeds. Registry. Notice. Prescription. *Mesne* profits. Statute of limitations. Charge of Court. Before Judge CLARK. Lee Superior Court. March Term, 1876.

In February, 1858, Granniss, as the administrator of Kennedy, brought ejectment against John Herron for lot of land one hundred and forty-four, in the thirteenth district of Lee county, and for *mesne* profits. Herron died in 1870. At the March term, 1871, of Lee superior court, an order was passed reciting his death; that James Gardner, of Richmond county, was the real defendant and directing that he be served with a copy of the declaration and process twenty days before the next term of the court. Service was accordingly perfected on September 1st, 1871. In October, 1872, service was again perfected on Gardner and on his wife. They appeared and pleaded the general issue and title by prescription.

The plaintiff showed a regular chain of title from the state to himself. One link consisted of a deed from Theodosius Cook, the original grantee, to John Fergerson, executed in presence of Sarah Cook and Smith Cook, dated April 19th, 1834, and recorded November 29th, 1837, upon the following probate:

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"GEORGIA—MONROE COUNTY:

"Personally came before me, Smith Cook, who being duly sworn, says that he saw Theodosius Cook sign the within deed for the purpose therein mentioned, and that Sarah Cook, by making her mark, subscribed as a witness to said deed, and that the said Smith Cook did also sign his name as a witness to the same. (Signed) SMITH COOK.

"Sworn to and subscribed before me,

this 19th April, 1834.

"J. FERGERSON, J. P."

The plaintiff also proved by two witnesses, the following facts: The land in controversy was a forest lot and vacant until purchased by Bartlett in 1853. He sold to Jordan in 1853 or 1854. The latter cleared from sixty to ninety acres and cultivated it until his death. After his decease Gardner went into possession, as his son-in-law, and has so remained until the present time. Herron was his overseer in 1858, and at the time this suit was brought. He died in 1870. Worth from \$1 00 to \$2 00 per acre per annum as rent. In 1866 and 1867 was worth about \$4 00 per acre rent. There are now about one hundred and twelve acres cleared. Worth \$5 00 per acre to clear it. Improvements are worth about \$300 00.

" The defendants showed a regular chain of title from Joab Cook, as administrator of Theodosius Cook, to themselves. The deed from the administrator was executed on July 6th, 1852, and recorded on the next day.

They also showed by Sarah Wilder, formerly Cook, that she never witnessed the deed from Theodosius Cook to Ferguson.

Plaintiff introduced the petition of defendant Herron, made at the April term, 1858, in which he stated that he expected to show that the deed from Theodosius Cook to John Ferguson was a forgery; that he would show by Sarah Cook, who purports to be one of the attesting witnesses, that she never signed the same. Therefore he prayed that plaintiff

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be required to file said original deed in the clerk's office for the use of defendant, to be attached to interrogatories to be submitted to witnesses for the purposes aforesaid.

Also, the affidavit of Sarah Wilder, formerly Sarah Cook, made in support of such petition, to the effect that in the spring of the year 1834, Fergerson purchased of Theodosius Cook a lot of land in the tenth district of Early county, number three hundred and forty-four, and that she witnessed the deed to that lot; that Cook refused to sell the lot in controversy; that she never witnessed a deed to that lot, and that if any such instrument be produced, with her name thereon as a witness, it is a forgery.

Also, the depositions of Theodosius Cook, grand-son of the maker of the deed, proving the signature of Smith Cook, and that he died in Henry county in 1838 or 1839.

Also, an affidavit made by the defendant Herron, attacking the aforesaid deed as a forgery, and the proceedings had thereon, at the September term, 1869, resulting in a verdict sustaining the genuineness of the deed.

In order to lay the necessary foundation for the introduction of such deed as an ancient document, plaintiff introduced Mr. Sneed, an attorney at law, who testified that a short time before the institution of this suit, Kennedy, then in life, and his client, gave him the Fergerson deed, and the others read in evidence, as constituting the chain of title under which he claimed the lot in controversy; that these deeds have been in his possession and in that of his associate counsel, from then until now; that soon after the commencement of this suit the Fergerson deed was submitted to the court for inspection; that a short time after the deposition of Mrs. Wilder was returned, the first trial was had, and her evidence used thereon by the defendant.

William C. Gill testified, in substance, as follows: On the day Bartlett obtained title to this lot from Williams, he asked witness to go and attest the deed as a justice of the peace; witness then told Bartlett that there was another deed from the drawer for the lot, and he replied that he knew all about

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it; he was safe, as he got a warranty from Williams, who was a wealthy man; saw the Fergerson deed on record in 1851, and feels sure that the probate, as now on the deed, was recorded there, for it was something strange to him; saw Williams in Griffin in 1853. He complained of Bartlett's not paying him for the land. He stated that the Fergerson deed was a forgery, and that he had told Bartlett all about it.

David A. Vason and W. A. Hawkins testified, in substance, as follows: Bartlett, before purchasing, employed them to investigate the title to the lot in controversy. They found the record of the Fergerson deed. There was no probate of record. If it was there, it did not follow the deed as a part thereof. They had a certified copy made by the clerk, which they now have in court. They advised Bartlett that this was an irregular registry, was not legal notice to any one, and that he could safely purchase. He bought, and afterwards sold to Jordan. Witness, Vason, was called on by Bartlett to see Jordan in reference to the sale. Jordan stated that he had heard that there was another deed of record, and he did not wish to pay for this lot unless the title was good. Witness explained to him the facts, and stated that he and Hawkins both agreed that the defective record did not affect his title. He replied that he was satisfied there was no danger, but he did not wish to have a law-suit, but that if Bartlett would secure him from trouble and danger he would pay for the lot. This was done and the trade consummated. Neither of witnesses represented the present defendants until they were served in October, 1872. The entry of record on the Fergerson deed was in the handwriting of the then clerk of the superior court. Gardner was notified of the suit against Herron, but neither appeared nor employed counsel. Neither he nor his wife ever resided in Lee county.

The plaintiff also introduced the will of Theodosius Cook, executed on August 26th, 1834, and admitted to probate on the 17th of the following September. It consisted of three items; the first asserted that he owed no debts; the second disposed of lot number one hundred and forty-three, in the

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third district of Henry county; the third disposed of certain rents and debts due to him.

The remaining facts, so far as material, will be found in the opinion.

The jury found for the plaintiff the premises in dispute, \$2,178 00, *mesne* profits, and costs of suit.

Defendants moved for a new trial on the following grounds:

1st. Because the court erred in allowing plaintiff to discontinue said case as to Herron, and to make Gardner and his wife sole defendants therein, it appearing that Herron died in 1870; that they were not served with a copy of the declaration until October, 1872, and that they then resided, and still reside, in Richmond county, Georgia; also in holding that this court had jurisdiction over them, that service as to them was regular, and in allowing plaintiff's case thus to proceed.

2d. Because the court erred in allowing the affidavit of Mrs. Sarah Cook to be read in evidence by plaintiff, without any proof of its execution or having laid the foundation for it, and in holding that, as it had been used by defendant, Herron, to sustain an application to require plaintiff to file his deed in office, it could now be used by plaintiff as evidence.

3d. Because the court erred in allowing Gill to testify that the probate to the Fergerson deed was upon the record, as a part of said deed, when he inspected it in 1851, although it was not contained in the certified copy of the record made by the keeper thereof in 1853, before the records were destroyed by fire.

4th. Because the court erred in allowing said deed to go to the jury as an ancient document upon the evidence of Sneed and Gill—Sneed stating that the deed, with others, was placed in his hands, as an attorney, by Kennedy as one of the deeds under which the latter claimed the land, it not being thirty years old at the time of the suit in 1858, and there being no evidence of possession of the land thereunder.

5th. Because the court erred in allowing said deed to be

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placed in evidence upon the defective probate, and without proof of its execution.

6th. Because the court erred in admitting evidence to prove the death and hand-writing of Cook, one of the subscribing witnesses to the Fergerson deed, the evidence of Sarah Cook, the other subscribing witness, being in court denying that she ever witnessed the execution of the same, and in allowing the deed to go to the jury upon such proof.

7th. Because the court erred in allowing the verdict and judgment upon the issue of forgery made on the Fergerson deed, to be introduced in evidence, it appearing that these defendants were not made parties until long after the trial of that issue.

8th. Because the court erred in refusing to charge the following requests:

"(1.) If you believe, from the evidence, that the deed from Cook to Fergerson, dated 19th of April, 1834, is a forgery, then you will find for the defendants, the rule of law being that the plaintiff must recover on the strength of his own title, and not upon the weakness of the defendants' title.

"(2.) In determining whether the deed is a forgery or not, you will look to the evidence on that issue. The witnesses to a deed must, in all cases, be produced when it is in the power of the party to produce them. If the witnesses cannot be produced, then it may be proved by their hand-writing, but to show a perfect execution of a deed, signing, sealing and delivery are all essential. The hand-writing of the witnesses and maker being the next grade of evidence after attesting witnesses, if they have failed to prove the signatures of all the witnesses and the maker, the mere opinion of other persons that the hand-writing is that of one of the witnesses is secondary, and can only prevail in the absence of stronger and better evidence. The fact that the deed is an ancient document does not relieve it from being attacked as a forgery.

"(3.) If you believe that Theodosius Cook died in 1834, and that Joab Cook took out letters of administration, ob-

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tained an order to sell the land and did so, that it was bought at such sale by Bartlett, sold to Jordan, and the deeds recorded within twelve months after their execution, then unless Jordan had notice of the outstanding title in Fergerson, then the second deed will take the title; and the fact that he read the original record of this deed, or was informed that such was on the record, would not be such notice as the law requires, or such as would affect his title.

"(4.) The issue made by Herron, the sole defendant, on the fact of the deed of Theodosius Cook being genuine, and the verdict thereon, does not bind any but parties and privies in estate and law; and if Gardner was not a party at the time, and did not know of or participate in said trial, then he can submit evidence before you as to its being a forgery; and if you believe, notwithstanding said verdict, that the deed is a forgery, you ought to find for the defendants.

"(5.) The plaintiff in this case can only recover upon the demise of Kennedy, and if you believe that Gardner and the children were not made parties until 1872, (at that time Herron being dead and his administrator not being a party) then the statute of limitations continued to run as to Gardner and the children; and if more than seven years elapsed, then the plaintiff cannot recover.

"(6.) If you believe, from the evidence, that Jordan went into possession of the lot of land under a deed from Bartlett, continued to occupy and clear for more than seven years, that Gardner and the children went into possession under Jordan, and the time is more than seven years from Jordan's entry until the suit was commenced against the Gardners, then you ought to find for the defendants."

9th. Because the court erred in refusing to charge the following request of defendants' counsel: "If you are satisfied, from the evidence, that the lot of land is, by reason of the improvements placed upon it by defendant, more valuable than it would be in the forest, then the plaintiff is not entitled to recover any *mesne profits*."

10th. Because the verdict was contrary to law, contrary to

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the evidence, and without evidence to support it, and decidedly against the weight of the evidence.

11th. Because the verdict for *mesne* profits is excessive, without evidence to support it, and against the law and the charge of the court.

12th. Because the court erred in allowing plaintiff to prove the claim for *mesne* rents from 1853, against these defendants, they having had no connection with the case until they were served with a copy of the declaration in October, 1872. [Defendants' counsel insisted that if the court had jurisdiction of them upon the question of title to the land, it had not upon the suit for rent or damages, they residing in Richmond county.]

13th. Because the court erred in admitting in evidence a certified copy of the will of Theodocius Cook, it not appearing from the will that the testator intended to dispose of all his estate.

14th.	*	*	*	*	*	*
15th.	*	*	*	*	*	*
16th.	*	*	*	*	*	*

17th. Because the court erred on the trial of the collateral issue as to the Fergerson deed being a forgery, at a previous term, on the various grounds set forth in the bill of exceptions filed, *pendente lite*, which is made a part hereof. (These exceptions came up as a part of the record.)

18th. Because the verdict was contrary to law and the evidence, and against the weight of the evidence.

19th. Because the court erred in charging as follows: "If you are satisfied, from the evidence, that Herron, at the time he was served, was overseer for Gardner, and that he defended the suit in his own name, or permitted others to use his name by way of defense, and that Gardner knew of these facts, then the question of whether the deed from Cook to Fergerson was a forgery or not, was not an open question; such notice affected Gardner and he was bound by the verdict rendered by the jury on the issue of forgery; but if Herron was not the overseer, or if he did not defend nor permit others to

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defend in his name, or Gardner did not know of these facts, if they existed, then it is for the jury to say whether or not the deed was a forgery.

"If you believe that Herron was Gardner's overseer at the time he was served, in 1858, that he made defense or allowed others to do so in his name, and Gardner had notice of these facts, the statute of limitations set up by defendants ceased to run from the date of the filing of the suit, and Gardner must show seven years adverse possession prior to such filing; but if Herron was not overseer, or did not defend or allow his name to be used for defense, or if these facts existed and Gardner did not know of them, then the statute of limitations did run in favor of Gardner, from the time his adverse possession commenced, until the service on him in 1872.

"The deed from Cook to Ferguson is illegally recorded, and for all purposes may be considered as not recorded at all. It is no notice to a *bona fide* purchaser who records his deed within twelve months; and if the purchaser, with no other notice than the illegally recorded deed, records his deed within twelve months, his deed takes priority over the deed illegally recorded. But if Williams, Bartlett and Jordan, had actual notice of the Ferguson deed, or had such other notice as to put a reasonably cautious man on inquiry; if they saw the deed on record, or if they had such notice as to make them act with reference to it, that is, if they had such notice as to make them take unusual precaution, as, for instance, being unusually cautious as to the solvency of their warrantor, and relying more on this than on the strength of their title, or demanding security before consummating the trade for the land, then they are charged with notice of Ferguson's deed, and though it is illegally recorded, they gain nothing by recording their deed within twelve months. If plaintiff is entitled to recover, he is entitled to recover *meane* profits from commencement of suit to date, after deducting the value of improvements and the increased value of the land over and above improvements, on account of them."

The motion was overruled, and defendants excepted.

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VASON & DAVIS; W. A. HAWKINS, for plaintiffs in error.

R. F. LYON, for defendant.

BLECKLEY, Judge.

Cook acquired the land by grant from the state, and was the common source from which both parties claimed to have derived title. The plaintiff's chain commenced with a deed from Cook to Fergerson, dated in 1834, and recorded, on a defective probate, in 1837. The genuineness of this deed was in question. The defendants' chain commenced with a deed from Cook's administrator to Williams, dated and duly recorded in 1852. The action was commenced in 1858 against Herron, who died in 1870, and whose representatives have never been made parties. The Gardners were brought in as parties defendant, at the plaintiff's instance, in 1871.

1. The Gardners resided in Richmond county. In the first, and again in the twelfth ground of the motion for new trial, the point is presented, that such residence deprived the court in Lee of jurisdiction as to them. The first ground makes the further point, that the service upon them was not valid. But they had appeared and pleaded to the merits, without objecting either to the jurisdiction or the service. At the trial, they were too late with these objections. We do not intimate that urging them at the first opportunity, would have been attended with success. Ejectment has to be brought in the county where the land lies, and generally the recovery of *mesne* profits must be had, if had at all, in the same action: See Code, sections 3403, 5119, 3356, 3357; 22 *Georgia Reports*, 572, with which compare 19 *Ibid.*, page 30. The right to introduce new defendants, pending action, seems to be without restriction as to their residence: Code, section 3360.

2. The first ground of the motion for new trial complains, moreover, that the action was discontinued as to the original defendant, and in that state was tried as to the Gardners. But these latter were committed to the case, as a case against them-

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selves, when they became parties and pleaded to the merits. Not until after that occurred, was the case "discontinued," as it is called in the record, with respect to the former defendant. When the Gardners were upon the record as parties and at issue with the plaintiff on the merits, they were parties, to all intents and purposes; and they did not cease to be so, though the action was allowed to drop as against the deceased and his estate. Ejectment can be tried as to defendants who are alive, without calling in the representatives of a deceased defendant: 13 *Georgia Reports*, 282; 44 *Ibid.*, 514; Code, sections 3441, 3444. If it should be thought that the general rule stated in the latter of these two sections of the Code, does not apply to ejectment, because this class of actions is specially provided for in the former section, the criticism may be accepted with little or no detriment to our present ruling, which is based chiefly on the fact, that, though the original defendant was already dead when the Gardners were brought in, they suffered themselves to become parties without objection, and made up for trial issues between themselves and the plaintiff which could be fully and correctly tried without other parties, especially without the representatives of their own own overseer.

3. The seventeenth ground of the motion for new trial, relates to alleged errors embraced in a bill of exceptions filed and entered *pendente lite*. These matters grew out of the special issue of forgery, raised and tried whilst the deceased defendant was living, and before the Gardners were brought into the case. For the trial of that special issue to be reviewed, it is essential that the parties to it should be here, by themselves or their legal representatives. Death has removed one of them, and his place cannot be filled, except by his executor or administrator.

4. The special issue of forgery involved the deed from Cook to Fergerson, one of the deeds essential to the plaintiff's ultimate recovery. The issue was found in favor of the deed. The admissibility and effect of that finding, in the subsequent trial of the main case, are points presented in the seventh

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ground of the motion for new trial, and in the fourth request to charge, set out in the eighth ground, and in the charge as given, set out in the nineteenth ground of the motion. The Gardners, it will be remembered, were not parties to the suit, or to the special issue, when the latter was tried, and there is no evidence that they had concerned themselves with the litigation or taken any part in its management. The same reason which prevents them from having this writ of error applied to the proceedings that took place on the issue of forgery, prevents them from being affected by those proceedings, or by the verdict rendered in the same. Not being entitled to purge the result of error, supposing it to contain any, they are not bound to abide it. If they had voluntarily become parties, they might be held to have adopted the case as they found it; but they were brought in by the plaintiff, who seeks, not only to recover of them the land, but to make them liable for *mesne* profits. Though a recovery of the land from the original defendant might have been a recovery thereof as to them also, (see 47 *Georgia Reports*, 540; 53 *Ibid.*, 94,) the like rule would not hold as to *mesne* profits. A judgment for these against their overseer could not have been collected out of them or their property. The truth is, that when a plaintiff in ejectment discovers that his suit is against a mere tenant, overseer, or agent, he has the option to bring in the defendant's principal or landlord, or not, as he may elect. And if he desires to bind the latter, conclusively, even by the final judgment as to the possession or the title, it would be far better to bring him in, when practicable, before that judgment is rendered. If, moreover, he seeks to bind or affect him by an interlocutory verdict, order or judgment, he should summon him early enough to let him be heard in resistance to the making of it. We think the finding of the jury on the issue of forgery, was not even admissible evidence against the Gardners after the main case had been discontinued as to the overseer. The plaintiff should not be permitted to take the full fruits of a full trial, and yet try only in part. Nor should he try some of his case with one defendant, and the balance

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with others, without the presence of the first or of his legal representatives.

5. The second ground of the motion for new trial relates to the affidavit of Sarah Cook. Her evidence was introduced by the Gardners to prove the deed a forgery. The plaintiff, to contradict her or affect her credit, read in evidence an affidavit made by her, and which had been used in this litigation by the deceased defendant to sustain his application to require the deed to be filed in the clerk's office. It was admitted (probably because it had been so used) by the court, though proof of its execution was not made, and though no foundation for it as impeaching evidence was laid; that is, as we infer, it was not exhibited or read to her, nor was her attention called to its contents. As the affidavit purported to have been made in this state, it needed no proof of execution other than that afforded by the official attestation of an officer authorized to administer oaths. But unless the statements in it were "*made* under oath in connection with some judicial proceeding," the foundation should have been laid: Code, section 3872. That *making* the affidavit was connected with a judicial proceeding, would not be inferable from the use of it; unless the use had been by the person or persons now to be affected by the inference. Such an affidavit is not like answers to interrogatories, which latter, being necessarily *made* in connection with some judicial proceeding, would fall within the terms of the Code, whether ever used in the proceeding or not. The affidavit now under consideration, may have been made with no reference to this or any other case, but being in existence and adapted to the purpose, may have become connected, for the first time, with the proceeding, when it was used or filed.

6. The third ground of the motion for new trial makes the point, that, when there is in evidence a certified copy of a deed, taken in 1853, from the record since destroyed, parol evidence is not admissible to show, that, in 1851, a defective probate, such as now appears on the original deed itself, was upon the record; that both the deed and the probate were recorded

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together. The officially certified copy, made in 1853, gave no probate, and was silent as to any. The witness who read the record in 1851, read the probate as well as the deed. We do not see that there is here any inconsistency or contradiction. But suppose there was, is the record of a deed without probate, or even with a defective probate, an official record at all? And if not, can the contents of the record be proved, before or after destruction of the book, by a certified copy? Can the clerk authenticate the copy of a record which the law did not authorize him or his predecessor in office to make? Instead of the copy now said to be superior to the parol evidence being the exclusive evidence of what appeared in the book, a grave question might be raised whether its rank is not lower, instead of higher, than that of the parol evidence: 11 *Georgia Reports*, 636.

7. The thirteenth ground of the motion for new trial complains of the reception in evidence of Cook's will, executed later than the date of the deed to Fergerson—the deed said to be a forgery. The will disposes of other land but is silent as to this. The reason of the silence might be, that he had conveyed the land by the deed in question. True, it might be something very different; as, that he forgot some of his property, or desired to die testate as to some but not as to all. Though the will may be slight evidence, we think it was relevant, and therefore admissible: 44 *Georgia*, 515, (2.)

8. The fourth, fifth and sixth grounds of the motion for new trial, make the question whether there was evidence enough, and of the right kind, to admit the disputed deed in evidence as an ancient document. The deed, if genuine, was less than thirty years old when the action was brought, but was past that age at the time of trial. The competency of evidence depends, as a general rule, on the state of things at the time it is offered and received. A court does not usually say, this was not evidence heretofore and therefore cannot come in now, or, this was admissible once and therefore is admissible still. A witness once incompetent may become competent; a document not well authenticated may be better

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authenticated ; a particular fact, in one state of circumstances, may be no evidence, and in another and later state, the best of evidence. At the time of trial, the deed was old enough to testify for itself, and not until then did it come forward to make its testimony heard. Till fit to speak, it was silent. It came from the proper custody, and was fair on its face. The handwriting of one of the subscribing witnesses was proved ; that is, his attesting signature was shown, presumptively, to be genuine. There was, on the deed itself, a defective probate by that witness, or purporting to be by him. On the deed, too, was an entry of recording, dated more than thirty years before the trial, and both written and signed by the clerk who was in office at the time the entry bore date. True, the other subscribing witness was alive and accessible ; in fact, was examined by the adverse party in opposition to the deed. But was it necessary to call her to prove the deed, in addition to, or in place of, the corroborated evidence adduced ? Because one of the subscribing witnesses to an ancient deed can be produced, or is present, must he be examined ? Must he be examined, though the deed be ancient, and though it be known that his testimony will tend to overthrow, rather than to establish it ? There seems to be some authority to the contrary : Code, section 3837 ; 3 Phil. Ev., Cowen & Hill, note 937, p. 1356 ; *Ibid.*, note 910, p. 1396. What a subscribing witness testifies may be contradicted : 18 *Georgia Reports*, 40, 350. The point was urged that actual possession of the land at some time under, or in pursuance of the deed, would be necessary to admit the writing as an ancient document. That might be so if the good appearance, the date, and the custody, of the paper were all. But in this case there was more ; there was satisfactory evidence that the deed actually existed and had passed through the clerk's office more than thirty years before the trial, and there was some evidence, such as the handwriting of an attesting witness, tending to show actual execution. Besides, it appeared that there was no adverse possession at the date of the deed, nor for nineteen years thereafter. The following authorities may be

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consulted on this question : 1 *Kelly*, 551 ; 8 *Georgia Reports*, 201 (3) ; 12 *Ibid.*, 267 ; 13 *Ibid.*, 523 ; 23 *Ibid.*, 406 ; 29 *Ibid.*, 355 ; 31 *Ibid.*, 593 ; 33 *Ibid.*, 565 ; 43 *Ibid.*, 346 to 352 ; 49 *Ibid.*, 165 ; 3 Phil. Ev., Cowen & Hill's Notes, pp. 1310 to 1316, note 903. The admission of the deed in evidence, would not be decisive of its genuineness. The jury might still, viewing it in the light of all the facts, think it not genuine, and find accordingly.

9. The first request to charge, and the equivalent thereof at the close of the fourth request, both stated in the eighth ground of the motion for new trial, should have been recognized as sound law. If the deed was a forgery, the plaintiff's line was broken, and defeat was inevitable.

10. In the eighth ground of the motion for new trial, the third request to charge relates to the effect of recording a younger deed in due time, where there is an elder not duly recorded. It concedes that notice of the elder would prevent the younger from taking so as to be a source, or vehicle of title to another purchaser, if he, also, had notice. The real point the request makes is, as to what constitutes or is evidence of notice. It denies that reading, or hearing of, a record of the elder deed will suffice, if the recording took place upon an insufficient probate, such recording being extra-legal, or unauthorized, and the same as none. The subject comes up again in the court's charge set out in the nineteenth ground of the motion for new trial. We think the court was substantially correct ; and that whatsoever would place a man of ordinary prudence fully upon his guard and induce serious inquiry, would amount to notice, or be evidence from which the jury might infer it : 25 *Georgia Reports*, 277 ; 55 *Ibid.*, 438 ; Code, section 2790. Perhaps the court should have left the sufficiency of the facts more distinctly to the jury, instead of declaring, as a matter of law, that such or such would be sufficient. Of course, the record upon defective probate, unless actually seen or heard of, would count for nothing. The mere existence of such a record, would not put any person on inquiry who was not informed of its existence : 7 *Georgia*

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Reports, 432; 11 *Ibid.*, 636; 13 *Ibid.*, 443, (5.) The difference is, that when a deed is well recorded, everybody must be presumed to know of the record, for certain purposes; but when not well recorded, the presumption of ignorance holds, until actual knowledge or information of the record is clearly proved.

11. Prescription, or the statute of limitations, is dealt with in the eighth ground of the motion for new trial, (fifth and sixth request to charge) and in the nineteenth ground of the motion, which sets out the charge on that subject, as the court gave it. We shall speak of the sixth request under another head. The fifth was correctly refused; and the charge given was not less favorable to the defendants than it should have been. Perhaps, in some minor particulars, it was more so. If the action was originally against the overseer or the tenant of the Gardners, the possession against which it was aimed could not, while the action was proceeding for the express purpose of putting an end to that possession, count in their favor as part of the means of defeating the action. The possession was, so to speak, *sued*; and if it was their possession, whoever held it for or under them, was a proper person to name as a defendant, whether they, also, were named with him or not. If the suit was an attack upon their possession, they having no possession except that in which they were represented by the overseer or tenant when sued, it would never, so far as prescription or limitation is concerned, be too late to make them parties, so long as that suit was pending. However late they might come or be brought in, it would still be a suit applying to the same possession which existed at the time it was originally commenced; that is, *their* possession, then held by their tenant or overseer, though now held, it may be, directly by themselves in person: See 47 *Georgia Reports*, 540.

12. How far back the reach after *meane* profits might extend, is one of the questions raised in the twelfth ground of the motion for a new trial, and further dealt with at the close of the court's charge in the nineteenth ground. Evidence, it

Gardner et al. vs. Granniss.

seems, was admitted covering a considerable period of time anterior to any connection by the Gardners with the premises, or with the title under which they claim. The court's charge, however, seems to contemplate that profits as far back as to the commencement of this suit, and no farther, were to be considered. The rule is stated in 47 *Georgia Reports*, 540, touching profits and improvements ante-dating the claim of title by a defendant. Of course, a defendant who takes no credit for improvements made prior to his own time, is not chargeable with profits enjoyed by his predecessors. It is equally clear that if he does take credit for their improvements, all profits chargeable to them, or to those of them who erected the improvements, should first be deducted.

13. In the state of the pleadings, the court was certainly correct in permitting profits to be computed from the commencement of the action; that is, if the plaintiff was entitled to recover at all, and if the original defendant, as seems to be well established, was in as overseer of the Gardners, and held alone for them when the action was brought. To protect themselves from accounting for all the profits, whether accruing before or after the commencement of the action, which they had taken, directly by themselves, or indirectly through another in their employment, on the ground that, by reason of delay to make them parties, a portion of the profits had, as to them, become barred by the statute of limitations, the statute, as applicable to *mesne* profits, should have been pleaded: Code, section 3058; 46 *Georgia Reports*, 120. How far, under the circumstances, such a plea would have been available, we do not decide. It is enough to say, that, in the absence of the plea, the charge was not error.

14. We fail to perceive any merit in the ninth ground of the motion for new trial, which suggests that the question of *mesne* profits is entirely out of the case if, by reason of improvements erected by the defendants, the land is more valuable now than it would have been if it had been let alone. This would, indeed, be a novel principle to establish between parties in ejectment. With improvements adding perma-

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nently \$1 00 to the value of the premises, and no deterioration of the original estate, in the meantime, a false claimant might enjoy a plantation, or, it may be, a whole county, for years, free of rent. There must be some mistake of law where such a proposition is accepted, or deemed acceptable: Code, sections 2906, 3468; 39 *Georgia Reports*, 328.

15. The requests to charge are all in the eighth ground of the motion for new trial. Most of them have been sufficiently disposed of in the preceding paragraphs of this opinion. They may now be passed over rapidly. The first request is good law; the second is sound in part, but for the most part, unsound or inapplicable. The third closes wrong whether it opens correctly or not. The fourth is substantially sound, but why instruct the jury that a party could submit evidence? The fifth begins well, but ends ill. The sixth does not accurately put a case of adverse possession, (Code, section 2679,) even if it were otherwise unobjectionable. Further elaboration, would be both tedious and unprofitable.

Judgment reversed.

JOHN R. HART, plaintiff in error, *vs.* GRANVILLE, WHITTLESEY & COMPANY, defendants in error.

This court will not control the discretion of the presiding judge in granting a new trial, on the ground that the verdict is decidedly and strongly against the weight of the evidence, unless the record makes it plainly appear that the judge abused his discretion in setting aside the verdict.

New trial. Before Judge WRIGHT. Upson Superior Court.
November Adjourned Term, 1875.

Reported in the opinion.

M. H. SANDWICH; A. D. HAMMOND; SPEER & STEWART, for plaintiff in error.

J. Y. ALLEN, for defendants.

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defendants as a drummer. They argued after two or three months' trial that the defendants by attachment, were serving parties to whom the defendants, had sold goods, alleging a contract for \$150 00 per month. The defendants set up a contract by which they were to pay a percentage upon sales, and the fact that Hart was not employed except at will, and that he got drunk and neglected business. The jury found some \$1,500 00 for plaintiff. Defendants moved for a new trial. The court granted it on the single ground that the verdict was decidedly and strongly against the evidence, and Hart brings the case here.

It is within the discretion of the Superior court to grant a new trial when the verdict is strongly and decidedly against the weight of the evidence: Code, section 3717. The only question for us, as a reviewing court, is, has the judge abused that discretion? It is not, would we have set aside the verdict from this record, had we presided; but did he abuse that sound discretion with which he, presiding and hearing the evidence and looking at the case in the light of a *nisi prius* trial, is wisely invested by the law?

We cannot say that in this case he has done so. On the contrary, we think that the letter of Hart indicates that he sued, not upon a contract he had made with defendants, but upon one under which he had served another former employer. The whole evidence is conflicting, it is true, especially upon the drunkenness issue; but the weight preponderates on the side the judge decided, especially when aided by the letter. "Oh, that mine enemy would write a book!" said Job, I believe; and Hart is not the first man who has hurt, if not ruined, his case by writing a letter. At all events, the letter sanctions the interference of the circuit judge with the verdict and prevents our holding that interference to have been illegal.

Judgment affirmed.

Seligman et al. vs. Ferst & Company et al.

JOSEPH SELIGMAN et al., trustees, plaintiffs in error, vs. M. FERST & COMPANY et al., defendants in error.

1. The injunction in bankruptcy contemplated by the decisions of this court in *52 Georgia Reports*, 371, and *55 Ibid.*, 547, is not alone a perpetual injunction granted on final decree.
2. The present case being special and peculiar, inasmuch as it grew out of attachments at law which were levied within four months preceding the adjudication of bankruptcy, and which were, therefore, dissolved, *ipso facto*, by the adjudication; and inasmuch as the bill and the appointment of a receiver were in lieu of similar attachments which could have been sued out by the complainants, their demands being, in their nature, legal and not merely equitable; and inasmuch as the seizure of the assets by a court of equity was made within four months preceding the adjudication, and the bankrupts were not made parties to the bill until after the adjudication; and inasmuch as said seizure was thus in the nature of attachment, being made without notice or warning to the debtors, and without any regular action *in personam* instituted against them: therefore, let the fund in the hands of the receiver be surrendered to said trustees, except so much thereof as is legally necessary to defray the costs and expenses of collecting the fund and of securing it until the order of surrender shall be granted.

Bankruptcy. . Injunction. Jurisdiction. Equity. Before Judge TOMPKINS. Chatham Superior Court. November Adjourned Term, 1875.

This case will be found fully reported in *55 Georgia Reports*, 546. It is only necessary to add the following:

To the petition of the trustees in bankruptcy to have the funds in the hands of the receiver of Chatham superior court turned over to them, the complainants filed, amongst other, the following objections:

- 1st. That the injunction alleged to have been granted by the district court of the United States for the southern district of Georgia, and referred to in said petition, if of any binding force or validity, is, and was, temporary only, and subject to the further order of the said district court upon the prayer of the bill upon which it was granted, and that demurrers to the said bill were filed at the July rules of said district court, next after the filing of the said bill, upon which demurrers the said cause is still pending and awaiting a hearing.

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2d. That the said bankruptcy proceedings were not commenced, nor prosecuted, nor the said petitioners appointed trustees in any court of the United States for this state.

3d. That it is not competent for the judge of the district court of the United States for the southern district of Georgia, or for that court, to enjoin any of the complainants from seeking redress in this court, for the purpose of aiding bankruptcy proceedings in a foreign jurisdiction.

4th. That no judge or court of the United States has authority to interrupt or enjoin parties in a cause pending in a court of this state, under the laws thereof, from proceeding with said cause.

5th. That any part of the bankrupt law which authorizes, or seems to authorize, any judge or court of the United States to interfere by injunction with parties who had already commenced to litigate in the courts of this state, is, to that extent, unconstitutional and void.

6th. That the petitioners are citizens of a foreign state, deriving their fiduciary character from the appointment of a foreign tribunal, to which alone they are amenable, and intend to remove the assets now in the hands of the receiver of this court, if delivered to them, out of the jurisdiction of this state into that foreign state, to be disposed of by that foreign tribunal.

7th. That this court having first taken jurisdiction of the case involving the distribution of said assets, and having said fund in its custody and control, and having all parties in interest before it, and full power and jurisdiction to afford full, complete, and adequate relief in the premises, and to determine the priorities of the respective creditors and claimants of said fund, is the proper tribunal to distribute said fund and not the said petitioners; and unless said fund is distributed by this court, there is no tribunal in the state to which these complainants can apply for the protection of their interests and the preservation of their rights, and they apprehend the loss of the entire fund to them if the same is delivered up to the said petitioners, who have not, nor can give, any bond or

Seligman *et al.* vs. Ferst & Company *et al.*

security available to these complainants in this state, to insure or protect their rights in the premises.

8th. That the assets of the firm of H. Mayer & Company, now in the hands of the receiver, were not, in or by the aforesaid bankruptcy proceedings in the state of New York, transferred to, or vested in, the said petitioners.

9th. That the said petitioners are not entitled to any of the said assets, except such as shall remain after payment of the creditors of the said firm of H. Mayer & Company, bankers, doing business lately in this state, and the costs and expenses incurred, and to be incurred, in the prosecution of the above entitled case.

10th. That the complainants, as the creditors of the said firm of H. Mayer & Company, have a priority in the distribution of the funds, in the hands of the receiver, to the extent of the amounts due to them respectively, which amounts have been ascertained by the report of the master in chancery, appointed by this court in said cause, over any claim of said petitioners as trustees as foresaid, and that said petitioners are entitled only to so much of said fund as may remain in the hands of the receiver, after distribution to these complainants, and such sum as may be found to be due the firm of Kaufman & Company, by the firm of H. Mayer & Company.

Wherefore the complainants submit that the order prayed for in the said petition ought not to be granted.

The chancellor refused the order prayed for and the trustees excepted.

A. T. AKERMAN; WEST & CUNNINGHAM, for plaintiffs in error.

J. R. SAUSSY; JACKSON, LAWTON & BASINGER; GEORGE A. MERCER; HOWELL & DENMARK, for defendants.

HARTRIDGE & CHISHOLM; W. U. GARRARD, for the receiver.

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BLECKLEY, Judge.

Notwithstanding the views indicated by this court in 52 *Georgia Reports*, 371, and 55 *Ibid.*, 547, in reference to injunctions by the federal courts in connection with their bankruptcy jurisdiction, it is still urged that there is no authority of law for granting any such injunction. If, indeed, none can be granted, then it cannot be necessary to obtain any. It follows that, in a proper case for turning over a fund, it should be turned over on due application for it, without any injunction. If this court has gone wrong heretofore in treating an injunction as a part of the assignee's or trustee's remedy to reach the fund, the correction of the error would not be to hold that there is no remedy, but that injunction is no part of it.

1. If injunction can be granted at all, that it need not be founded on a final decree in the federal court and thus be declared perpetual, is hardly doubtful. To wait for such an injunction before surrendering the fund, if, on the record evidence presented to the state court, the fund ought to be surrendered, would seem to be over-ceremonious. Doubtless, the chief, if not the only value of injunction, is to indicate a claim of right on the part of the federal jurisdiction to administer the fund for itself, free from the agency of the state tribunal. This purpose is served as soon as an injunction is granted with a direct view to causing the fund to be withdrawn for federal administration in bankruptcy.

2. The fund in the hands of the receiver of Chatham superior court being legal and not equitable assets, (see 18 *Georgia Reports*, 66, 67,) the seizure of the same, though by a court of equity, was in the nature of attachment, more especially as that seizure was made to satisfy legal and not purely equitable causes of action, and took place before the debtors themselves were made parties to the bill. It is true, the bill was amendable, and it was amended by making these persons parties; but this occurred after the adjudication in bankruptcy, and, consequently, after their title to the assets

Roberson & Company *vs.* Pope.

had been divested. When the trustees now claiming the fund were appointed, their title related back to the adjudication. That title they could enforce by action if the assets were in the hands of any private person ; but they cannot, or need not, sue the receiver, who holds them for the court, and, therefore, their remedy is by petition to the court whose officer the receiver is. Theirs, as appears from an inspection of the record, is the true legal title, and that title goes back behind the real, effective commencement of suit in Chatham superior court against the bankrupts. When the bankrupts were sued *in personam*, they had no title whatever. A decree against them in that suit ought not to dispose of assets to which they had no title when they were made parties, if the trustees, as they have done, come forward and assert their claim. In view of the special nature of the case, and as this is the second time it has been before us, we dispose of it by directing as set out in the second head-note.

Judgment reversed.

E. M. ROBERSON & COMPANY, plaintiffs in error, *vs.* SOLOMON L. POPE, defendant in error.

No error of law on the part of the court being excepted to, this court will not control the discretion of the presiding judge in refusing to grant a new trial, when the evidence is conflicting in respect to the custom on which the suit is founded, and in respect to the damage claimed by the plaintiff.

New trial. Evidence. Before Judge HILL. Crawford Superior Court. March Term, 1876.

Reported in the opinion.

W. S. WALLACE, for plaintiffs in error.

HALL, LOFTON & BARTLETT ; WINSLOW & BRANHAM, for defendant.

Roberson & Company vs. Pope.

JACKSON, Judge.

Roberson & Company cultivated a large plantation on Flint river, and Pope another on the same river. Roberson & Company sued Pope for damage done by the latter's stock and cattle to their crop in the fall, before it was gathered, alleging that there were no cross fences, and could be none between the farmers for miles on said river, and that the custom was for the several planters not to turn stock on any farm until all had gathered their crops, and that Pope, disregarding the custom, had turned his stock in upon his farm, and that they had got on Roberson's, and had damaged him. There was a verdict for defendant, Pope, and Roberson & Company made a motion for a new trial on the ground that the verdict was contrary to the evidence and the law, but not attacking any ruling of the court. The court overruled the motion for a new trial ; Roberson & Company excepted, and the sole question is, did the court err in refusing to set aside the verdict of the jury ?

The evidence was conflicting, both in respect to the custom and the fact that the damage was done by defendant's stock and cattle, one side contending that the custom was for every planter to turn on stock as soon as he gathered his own crop, and the other side contending that the custom was to wait for all together. The jury seemed to have found that the former was the custom, and as there is evidence to support the finding, the court below was right in not reopening the question. The evidence, too, was sufficient to support the verdict, that the stock and cattle of defendant did not do the damage by any remissness on his part, as the common outside fence was very defective, even if it had been clearly shown that defendant's cattle and stock did the damage at all, about which, too, there is conflict. In view of our oft-repeated rulings, we will not control the discretion of the court in overruling the plaintiffs' motion for a new trial.'

Judgment affirmed.

Dillard *et al.* vs. Ellington.

ELIZABETH A. DILLARD *et al.*, plaintiffs in error, vs. SIMEON C. ELLINGTON, administrator, defendant in error.

1. Where a bill for account alleges that a full accounting involves the investigation and settlement of several connected matters, and prays for discovery as to all of them; and where the complainants, after obtaining the discovery, amend the bill, striking therefrom one of the matters, (as to which the discovery made is favorable to the defendant,) the defendant is still entitled to use his answer as evidence, so far as it is responsive to the original bill. And the matter stricken from the bill is not put out of the case as to any purpose of defense which it would have subserved had it not been stricken.
2. When the complainants have gone behind a discharge granted to an executor by the ordinary, and have obtained discovery from him as to the actual state of his accounts, the executor may insist on having the actual state thereof considered in measuring the relief to which the complainants are entitled in respect to another branch of the case, so far as the accounts are correct and pertinent to the relief prayed for. If the judgment of discharge would have barred either party, each has waived the bar as to this litigation.
3. While it is possible for a responsive answer to discredit itself by contradictions and inconsistencies, or by gross violations of probability, and while, without such infirmities, it may be overcome by documentary evidence, still, when the court has charged the general rule that two witnesses, or one witness and corroborating circumstances, are required to overcome it, any further charge, if omitted, ought to be requested by counsel.
4. When, on the trial of exceptions of fact to the master's report, the report has been read to the jury by the excepting party, it is before them, not only as pleading, but as evidence.
5. In directing the jury on the form of their verdict, it is not error for the court to say, that the jury should find for or against each exception and declare it sustained or not sustained.
6. Where the evidence is, that bonds received by a legatee from the executor, were received *as bonds*, the jury should not be instructed to determine whether they were accepted as "good money."
7. The turning over, by an executor, to a legatee, of bonds in which the money of the estate has been legally invested, is in the nature, not of paying a debt, but of surrendering a trust fund. The transaction is not between debtor and creditor, but between trustee and *cestui que trust*.
8. When a legatee receives from the executor bonds in which the funds of the estate have been invested, and gives a receipt for the same as bonds, specifying the number and the amount of each, and the aggregate amount of the whole, the effect of the transaction is simply to discharge the executor from liability for the funds of the estate which were invested in such bonds. The bonds stand in place of what went into them by investment.

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9. If the bonds were turned over and receipted for as part of the estate coming to the legatee, but were, in fact, not a part of the estate, being, on the contrary, securities in which the executor had invested his own money, and if it does not appear that this fact was made known to the legatee, and that a different price was expressly agreed upon, the executor cannot, in the final settlement of his accounts, take credit for more than the actual value of the bonds at the time the legatee received them, with interest thereon.
10. If, during the late war, the executor rightfully applied his own money in paying expenses, he is entitled to credit only for the value of such money, with interest thereon.
11. To apportion any account between two debtors, if each is not to be charged with precisely half, one must be charged with as much more, as the other is with less, than half. No other apportionment is possible. Hence, half of the whole, plus half of the difference, will equal the larger debit; and half of the whole, minus half of the difference, will equal the smaller.
12. In refunding over-payments received from an executor, the legatee called to account, responds *to him* for such part as she received, and is not liable to a co-legatee who received less than she did. And this rule holds when the call to refund is after the death of both legatees, and is made only upon the estate of that one who received the major part. The executor cannot be resisted as to any of that part by showing that the estate of the other legatee has been settled up under a bill in chancery, to which the executor was a party; that no claim was made or allowed, in that settlement, for any difference between the two legatees, in the matter of over-payments; and that the heirs of both legatees are the same persons.
13. If the legatee die before the executor's claim for over-payments is barred by the statute of limitations, the statute will not run against him while he is administrator upon the legatee's estate.
14. That the administrator inventoried and returned certain property as part of the estate of his intestate, will not affect his right to assert that it was left in his hands in her life-time, with an agreement that it should be security for any sum that might be found due him on final settlement.
15. There being, in a will, a mixed bequest and devise of specific personality and specific realty, to the executor, in trust for the sole and separate use of the testator's two daughters (his only children) during their lives, and at their death, to their children, respectively; the property to be subject to the debts of no person, and to be held and managed by the executor until the elder daughter became of age, or married, and then to be equally divided; and if either daughter died without child or children, such property to revert to, and belong to, the other sister; and at the conclusion of the will, there being a residuary clause, giving directly to the same two daughters, in equal shares when distributed, all the residue of the testator's estate, of every sort and kind, not disposed of elsewhere in the instrument, the effect of these two clauses of the will, taken together, was to pass out of

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- the testator, at his death, the whole fee in the subject matter of the specific devise, as well as in the subject matter of the specific bequest; and there was left no reversionary interest to descend to his heirs-at-law.
16. Neither of the daughters having married or had children, on the death of the younger after the elder became of age, the deceased transmitted to her heirs no estate in any of the property embraced in the specific devise and bequest; as to that property, the survivor, from thenceforth, stood as if she had been alone, originally, in both clauses of the will. And, upon her death, afterwards, intestate and without children, the whole of said specific property passed to her heirs and legal representatives.
17. A devise which was obviously and necessarily contingent when the will was made, (such as a remainder in behalf of future children) is not, upon failure of the contingency, within the ordinary rule applicable to a void or a lapsed devise; and the residuary devisee will take, instead of the heir-at-law: 3 Maul. & S., 300; 1 B. & Adol., 186; 6 Paige Ch., 600.

Equity. Amendment. Discovery. Administrators and executors. Judgments. Practice in the Superior Court. Charge of Court. Master. Statute of limitations. Wills. Legacies. Remainders. Before Judge POTTE. Wilkes Superior Court, May Term, 1876.

The bill of complainants was filed on March 25th, 1873. The case, as made by the pleadings and evidence, is substantially set forth in the opinion.

At the May term, 1875, an order was taken referring the matters of account to the master in chancery, directing that "he report fully upon the state of defendant's accounts, as executor of William B. Ellington, as agent of Violet B., and also as her administrator." At the following November term, this officer made a lengthy report, the final result reached being as follows:

" He finds and reports that on the 1st of April, 1865, there was due the defendant, S. C. Ellington, from the estate of W.	
B. Ellington, the sum of	\$17,280 85
Interest on same to January 1, 1875	11,794 19
	<hr/>
	\$29,075 04

He finds and reports that, in transactions since April 1st, 1865, the defendant is indebted to said estate of W. B. Ellington, the sum of	5,841 93
Interest on same	2,307 38
	<hr/>
	\$ 8,149 31

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These sums, deducted from the sum of \$29,075 04, leaves the sum still due to defendant, to-wit:	\$20,926 73
He further finds and reports that V. B. Ellington received in excess of her sister Ann E., from the estate of W. B. Ellington, the sum of	5,768 77
Interest on same	<u>4,030 13</u>
	<u>\$ 9,788 90*</u>

These several sums added together make the sum of	\$30,715 63
Deduct the amount due the estate of V. B. Ellington as administrator	<u>3,155 70</u>
Balance due defendant upon settlement of the respective estates, etc	<u>\$27,559 93."</u>

Ann E. Ellington, referred to in this report, was a younger sister of Violet B., and the only other legatee under the will of W. B. Ellington. She died before Violet B. This will, so far as material, will be found hereinafter set forth.

To this report the complainants made the following exceptions for alleged errors of law :

1st. As appears from the evidence, the defendant, January 1st, 1862, owed the estate of the said W. B. Ellington, as executor, at least \$18,000 00 in gold coin, or its equivalent, and June 1st, 1865, the apparent balance in his favor, as such executor, is about \$20,000 00, the same having been caused by the investment by said defendant, in Confederate bonds, in 1863, with which investment the said defendant is improperly credited in said report at its par value in gold.

The complainants say that the said report should be corrected by debiting the said defendant with the amount so invested, to-wit: \$21,287 00, and that said apparent balance will then disappear. The said defendant really charges himself with the purchase money of said bonds by returning the same as the funds of the estate of said W. B. Ellington, invested under the proper authority in said bonds. That when said report is corrected, as suggested in this exception, it will appear that said defendant is still due the complainants a large balance, to-wit: all of his returned receipts as such executor

*Error in addition, or in amounts to be added.

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after June 1st, 1865, deducting the proper expenses of administration and other credits.

2d. The balance stated in said report to be due the said defendant (to use its language) "upon settlement of the respective estates," is not due at all, as is shown in the above exception, but, if any part of the same is due, it is wholly Confederate money, erroneously treated by said report to be an amount due in gold, and the same should have been scaled according to the tables of the value of Confederate money which were in evidence.

3d. If there is due the said defendant any such balance as that mentioned in the second exception, the whole of the same is erroneously charged in said report to the estate of the said Violet B. Ellington, when one-half of it should be charged to the estate of Ann E. Ellington.

4th. The complainants say that the item \$9,788 90 with which said report credits the said defendant, the same being the principal and interest of an alleged over-payment by said executor to said Violet B. Ellington, should be stricken from the account, it appearing that the estate of Ann E. Ellington, the sole other legatee of William B. Ellington interested, can make no claim against the said defendant for such alleged over-payment, she having in her lifetime released the said executor from any liability for the same by her final receipt, appearing in his returns, which were in evidence before the master. Complainants further say, that if such over-payment can be legally inquired into, the estate of the said Violet B. Ellington would be liable for only one-half of the same, and liable to the heirs of the said Ann E. Ellington, deceased, and not to the defendant, which heirs are the same as these complainants.

6th. Because the master would not admit in evidence, the complainants offering the same, the proceedings of the superior court of Greene county touching the estate of Ann E. Ellington.

7th. During the administration of W. B. Ellington's estate, his executor, Simeon C., purchased seventy-five Georgia state

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bonds of various denominations—as fully appears from the returns which were in evidence before the master, the returns also showing that he received credit for all sums expended in their purchase. His returns further show that of these seventy-five bonds he collected, as they became due, ten bonds; that he delivered to V. B. Ellington twenty-four bonds; that he delivered to Ann E. Ellington thirty-five bonds, leaving unaccounted for six bonds, of the value of \$250 00 each, with which the said report fails to charge him.

Upon argument of these exceptions, the report was, by consent, corrected so as to charge Violet B. Ellington's estate with only one-half of the balance found due to the executor by the master, on April 1st, 1865, to-wit: one-half of \$17,280 85. The above exceptions were then overruled.

The case was submitted to the jury upon the following exceptions, arising upon matters of fact:

1st. The said defendant was discharged from being said executor, 2d March, 1869, when the estate of said W. B. Ellington owed him nothing, and if it did owe him anything, such discharge operated as a complete release of any claims that he may have held at the time against said estate, and such discharge was obtained by the said defendant, as executor, after a final settlement between him and the said legatees, and such settlement cannot now be reopened.

2d. As appears from said report, the defendant, January 1, 1862, owed the estate of William B. Ellington, as executor, \$18,656 00 in gold coin, or its equivalent, [using, for the rest of this exception, the exact words of the first legal exception *ante.*]

3d. [A repetition of the second legal exception.]

4th. [A repetition of the third legal exception.]

5th. Complainants say that, according to defendant's returns as executor, he had only the means to make his returned disbursements in Confederate money, during the period the same was in circulation, in payment of current expenses, advances to legatees, and not including investments in bonds, such means consisting of the balance of \$18,656 00 heretofore

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mentioned, and his entire receipts, as such executor, during the war, as returned, and that under such circumstances any loan of his own money to the estate of his testator to be invested in Confederate bonds, was unauthorized; and the accounts of said executor show one of two facts to be true, that he has failed to charge himself with the purchase money of said bonds, or that he loaned his own money to the estate of his testator to purchase the same.

And the complainants further say, that the said Violet B. Ellington received Confederate bonds to the nominal value of \$10,000 00 from the defendant as a part of her legacy aforesaid, June 2, 1864, said bonds being a part of those purchased by the defendant in 1863, as appears from his returns, and the same having been received as above stated, cannot be charged to her at all, and if they are to be charged to her they must be charged at their value when she received them, to-wit: \$555 00.

6th. The complainants say that the item \$9,788 90, with which said report credits said defendant, the same being the principal and interest of an alleged over-payment by said executor to said Violet B. Ellington, should be stricken from the account, it appearing that the same has already been credited to the executor in allowing his disbursements during the late war, and it appearing further that the estate of Ann E. Ellington, deceased, the sole other legatee of said W. B. Ellington interested, can make no claim against the said defendant for such alleged over-payment, she having in her lifetime released the said executor from any liability for the same by her final receipt set forth in his returns.

Complainants further say that if such over-payment can be legally inquired into, the estate of the said Violet B. Ellington would be liable for only one-half of the same, and liable to the representatives of the said Ann E. Ellington, deceased, and not to the defendant.

Complainants further say that all of such over-payment, if made at all, was made in Confederate money, which should be scaled to its proper value.

8th. Complainants say that a calculation made accurately

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and legally and differently from that of the master in his said report, in the particulars mentioned in all of these exceptions, shows that there is no balance at all due from the estate of the said W. B. Ellington to his said executor, but that there is a balance in favor of said estate to the amount of \$7,000 00, principal and interest.

9th. Complainants say, that if there is any balance due the said Simeon C., as executor as aforesaid, the same is a debt against the estate of his said testator, and can in nowise be collected out of the estate of his said intestate. And complainants further say, if any such claim ever existed, the same is barred under the statute of limitations as against both of said estates. And complainants further say, that the said Simeon C., by turning over to the said Violet B. all of the property passed under his testator's will, such property being the same as that which he now holds as her administrator, assented to the legacies of her father to her, and thereby divested himself of all right and title to the same as executor as aforesaid.

10th. Complainants say that the said Simeon B., by taking possession of the property of his intestate, as her administrator, is estopped from setting up any adverse claim of his own to said property, or any portion of it.

11th. Repeats the seventh legal exception.

Amongst other evidence, not material here, two receipts were introduced in precisely the same words and of the same date, (February 6th, 1868,) except one was signed by Ann E. and the other by Violet B. Ellington. The following is a copy :

" Received of S. C. Ellington, executor of W. B. Ellington, deceased, \$25 00, in full of all the balance that is coming to me from the estate of my deceased father, W. B. Ellington, and sixteen and one-half shares of the capital stock of the Georgia Railroad and Banking Company.

" Witness my hand and seal, this February 6th, 1868.

" V. B. ELLINGTON, [L. S.] "

" M. MARC, [L. S.]

" M. L. TOWNS, [L. S.] "

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On the 2d of June, 1864, Violet B. gave her receipt for twenty-four Georgia six per cent. bonds, described in the receipt as being of the following denominations : Five bonds of \$1,000 00 each ; seven bonds of \$500 00 each ; twelve bonds of \$250 00 each ; the receipt concluding, as follows : " Received the within twenty-four state of Georgia six per cent. bonds, described by number and date, amounting to \$11,500, as part of what is coming to me from the estate of my deceased father. 2d of June, 1864.

" V. B. ELLINGTON."

At the same time, also, the following :

" Received of S. C. Ellington, executor of William B. Ellington, deceased, nine bonds of the Confederate States of America, all dated 2d March, 1863 (here follows further description of the bonds), and two others, of same date, (here the two bonds further described) all amounting to \$10,000 00, as part of what is coming to me from the estate of my deceased father, William B. Ellington. This 2d June, 1864.

V. B. ELLINGTON."

Ann E. Ellington's receipt appears in the returns, as follows :

" Received of S. C. Ellington, executor of W. B. Ellington, deceased, eleven state of Georgia six per cent. bonds of \$250 00 each, (here are given the date and maturity) and nineteen state of Georgia six per cent. bonds of \$250 00 each, and the half of another, (date and time of maturity) and one state of Georgia six per cent. bond for \$500 00, (date, etc.) and one for \$1,000 00, (date, etc.,) and two for \$500 00 each, (date, etc.,) amounting in the aggregate to \$11,625 00 ; and six Confederate States bonds, \$1,000 00 each, dated 29th August, 1862, and due 1st July, 1874; and one Confederate States bond of \$1,000 00, dated 6th July, 1863, and due 1st January, 1871, and two of \$1,000 00 each, dated 2d March, 1863, and one of \$500 00, dated 6th January, 1863, and due 1st July, 1876, amounting in the aggregate to \$10,000 00, as part of what is coming to me from the estate of W. B. Ellington,

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deceased, late of Greene county, and State of Georgia. This
14th August, 1866. ANN E. ELLINGTON."

The returns show the following state bonds matured and collected at the dates as set forth:

January 2, 1862—To cash, seven state of Georgia bonds of \$500 each, this day due	\$ 3,500 00
May 2, 1863—To collecting one \$500 00 seven per cent. bond state of Georgia, due February 1, 1863, and interest	535 00
November 5, 1863—To collecting two state of Georgia six per cent. bonds, \$500 00 each	1,000 00

The returns show the following disbursements for Confederate bonds:

April 21, 1863—Funded treasury notes	\$ 2,500 90
April 25, 1863—Purchased of D. H. Ellington	1,538 32
Aug. 22, 1863 " F. T. Willis	6,309 69
Nov. 6, 1863 " Charles F. McCay,	10,431 49
Oct. 31, 1863 " J. T. Dawson	510 00
	<hr/>
	\$21,289 50

INSOLVENT CLAIMS.

"Received of S. C. Ellington, executor of W. B. Ellington, deceased, all the insolvent notes, papers and claims specified in the inventory and appraisement of said estate of William B. Ellington, deceased, and we do hereby discharge the said S. C. Ellington, executor, as aforesaid, from all liability relating to said insolvent papers and claims, and receive the same as a part of our legacy under the will of our deceased father.

"Witness our hands and seals, this 14th November, 1867.

"V. B. ELLINGTON, [L. S.]
"A. E. ELLINGTON, [L. S.]"

The will of W. B. Ellington, dated March 25th, 1848, was, so far as material, as follows:

Item 1st. Bequeaths his soul to God and his body to the dust.

Item 2d. Directs that his debts be paid.

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Item 3d. Bequeaths specific legacy in trust to his wife.

Item 4th. "I deem it prudent to secure a part of the property which I am about to give my daughters in such manner as to meet the changes and incidents which may occur in their lives, in addition to any protection the laws of the land may extend to them. I therefore bequeath and devise unto my executor, Simeon C. Ellington, in trust to and for the sole and separate use of my two daughters, Violet Belle Ellington and Ann E. Ellington, for and during their natural lives, and at their death to their children, respectively, to be subject to the debts of no person whatever, the tract of land whereon I now reside, containing eleven hundred acres, more or less, * * *, to be held and managed by my executor for their special benefit until my oldest daughter arrives at the age of twenty-one years, or marries, after which event I desire all of this property divided between my two daughters above named, in equal shares. Should either of my said daughters, Violet B. or Ann E., die without child or children, such property shall revert to and belong to the other sister."

Item 5th—8th. Specific and money legacies.

Item 9th. "All the residue of my estate, of every sort and kind, not disposed of above, I give to my two daughters above named, in equal shares when distributed."

Item 10th. Appoints Simeon C. Ellington executor.

It was also shown that William B. Ellington died in May, 1848, and that defendant immediately qualified as his executor; that he was finally dismissed by the court of ordinary of Greene county, on March 2d, 1869.

The jury found against all the exceptions.

The complainants moved for a new trial upon the following grounds, to-wit:

1st. Because the court overruled the exceptions based on errors of law in the master's report.

2d. Because the court charged the jury as follows: "You may look to the facts in evidence before you, of the receipt of Belle Ellington for the sum of \$10,000 00 to the executor.

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Is this payment to her in Confederate bonds to be estimated according to the face value of these bonds, or is it to be estimated according to the then value of these bonds.

"This question belongs to you exclusively. What was the intention of the parties to the transaction? Did Belle Ellington, in June, 1864, intend to receive these bonds for the amount of them in good money; or did she intend to receive them as Confederate securities at their value in Confederate currency? Did she accept these bonds in payment for the amounts specified in the receipt in money? If she received the bonds without objection as to their market value, you may presume, if the facts and circumstances warrant, that she took them for good money. Look to the receipt itself, the conduct of Miss Ellington, and all other evidence before you to ascertain the intention. You may look, also, to the last receipt of Miss Ellington, for \$25 00, which purports on its face to be a receipt in full of all demands against the executor. Does that receipt, considering the time that elapsed between that and the other, throw any light upon the matter of intention? This last receipt, though it purports to be a receipt in full, is subject to be explained by proof and to be reopened if the proof satisfies you that it ought to done."

3d. Because the court charged as follows: "Another exception to the report is that it improperly allows to the executor \$5,758 77, with interest, for over-payment to Belle Ellington, in excess of her share, on a division with Ann's share of the estate. Was this a proper allowance by the master? If this amount was over-paid to her, then he is entitled to be allowed that amount."

4th. Because the court charged as follows: "You will see by the original bill that certain questions are put to Simeon C. Ellington, as to his actings and doings as executor of William B. Ellington. After the original bill was filed, defendant answered, under oath, to that bill and to these questions. After that answer was made and filed, complainants amended their bill by disclaiming any discovery from Ellington as executor, inasmuch as a settlement had been made by the execu-

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tor of his accounts in Greene county, and he had been discharged as executor. Defendant's counsel insist that notwithstanding this, they can, in law, insist on bringing into this issue the accounts of said executor for the purpose of showing that Belle Ellington, one of the legatees, owed him certain balances against the claim of her heirs against him as administrator.

"These issues between counsel make issues of law for the decision of the court, and the directions which the court will give you, you will receive as law. I charge you, as matter of law, that when complainants called upon defendant, in their original bill, for a discovery in his answer, what the defendant answers in response to that call for discovery is evidence for him; those parts of defendant's answer, in response to the bill, are evidence for defendant and must be disproved by two witnesses or one witness and corroborating circumstances. So that you must consider such portion of these answers as are thus responsive, the truth of the matter in issue until so overcome by two witnesses, or one witness and corroborating circumstances. You may sift these answers and see how they reply to complainants' allegations; the consistency or inconsistency of these answers are matters for you to look into and pass upon."

5th. Because the court charged: "I further charge you that the discharge of Ellington, as executor, by the ordinary of Greene county, is no bar to defendant's setting up this claim for over-paid balances here, nor is he concluded by the settlement made in Greene county by King & Lewis."

6th. Because the court charged as follows: "At the time the investments were made in Confederate bonds, the law allowed the investments to be made even if good money was used for that purpose. It is for you to say what kind of money was used in the purchase of these bonds, and if in Confederate money, whether Miss Ellington accepted them as good money."

7th. Because the court charged as follows: "Take these exceptions, one by one, from first to last; if you find the ex-

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ception, or either of them good, say so as to each one; if you find the exceptions not good, say so as to each one. Say sustained or not sustained, as to each item of the exceptions. The following I suggest to you as a guide in your verdict; if you find the first exception good, say we sustain the first exception; or, if you find the exception not good, say we find against the first exception, and so on to the last."

8th. Because the court charged as follows: "Defendant's answer touching the amount and disposition of stocks and bonds received by, and the property of V. B. Ellington, being responsive to the interrogatories set out and propounded in complainants' bill, must be taken as true, unless disproved by two witnesses, or one witness and corroborating circumstances."

9th. Because the court failed to instruct the jury explicitly upon each exception as demanded by its allegations and called for and warranted by the evidence.

10th. Because complainants' counsel, having read the master's report, with their exceptions, as pleading, the court ruled that said report was in evidence.

11th. Because the verdict was contrary to law, to the evidence, without evidence to support it, and strongly and decidedly against the weight of the evidence.

The motion was overruled and complainants excepted.

The court thereupon decreed, in substance, as follows: That defendant, as the administrator of V. B. Ellington, proceed, upon giving legal notice, to sell all the Georgia Railroad stock held by him as administrator as aforesaid, and from the proceeds of said sale and the dividends thereon received since the master's report, pay as follows:

1st. The expenses of administration which have accrued since said account was taken and approved by the court and jury at the last term.

2d. To retain for his own use a sufficiency, if enough, to satisfy the amount found due him by said report.

3d. To pay any balance which may be remaining to the heirs-at-law of Violet B. Ellington.

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It decreed further that the tract of land devised to Violet B. and Ann E. Ellington for life, and their children, if any, upon the death of the said Violet B. and Ann E., without children, did not descend to the heirs of Violet B., but to the heirs of William B. Ellington living at the death of said Violet B.

To this decree the complainants also excepted.

Error was assigned accordingly.

JOHN C. REED; W. G. JOHNSON; LUMPKIN & OLIVE;
S. H. HARDEMAN, for plaintiffs in error.

R. TOOMBS, for defendant.

BLECKLEY, Judge.

Most of the heirs and distributees of Violet B. Ellington, deceased, filed their bill against Simeon B. Ellington, her administrator, for discovery and account; the object being to compel the administrator to distribute the estate, and pay to the complainants their respective shares, each share being one thirty-seventh part of the whole. As originally framed, the bill called for full discovery touching assets, expenditures, investments, and all transactions of the defendant, not only as administrator of the intestate, but as executor of the will of her father, W. B. Ellington, and as trustee under that will, and as agent of the intestate prior to her death. This wide range was taken, on the theory that the estate of the intestate consisted of more than the property set forth in the administrator's inventory, and that the excess was in the form of money, or other assets, for which he was accountable as executor of her father, and as her trustee and agent. The defendant answered, making the discovery prayed for; but instead of disclosing a balance against him, the answer claimed a balance in his favor, growing out of alleged over-payments by him as executor of the father's estate, and prayed a decree therefor. The complainants then amended their bill, striking out all allegations touching the defendant's transactions as

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executor, and renouncing any claim upon him in that character, averring that he had been discharged by the ordinary from his office of executor, after a final settlement of his accounts, and protesting against reopening the settlement or going behind the discharge. The court, nevertheless, referred the case to a master, to report on the defendant's several accounts, as executor, as agent, and as administrator. The master reported; and divers exceptions to his report were filed by the complainants, the same matters being presented, first as exceptions of law, and again, most of them, with some others, as exceptions of fact. The court overruled them (after some alteration was made, by consent, in the report) as exceptions of law; and as exceptions of fact, sent them to a jury for trial. A verdict sustaining the report by a general finding against all of the exceptions, was rendered. Thereupon the court made a final decree in conformity with the report, which allowed a large balance as due to the defendant for over-payments made to the intestate in her lifetime, by the defendant as executor of her father's estate. Going further, the decree, in defining the assets to be administered, construed the father's will in a way to exclude from the assets of the daughter's estate certain realty alleged by the bill to be a part of the property to be accounted for; the same being also set forth in the inventory returned by the defendant as administrator of her estate. The complainants made a motion for a new trial, grounded on overruling the exceptions as matters of law; on misdirection to the jury; on conflict of the verdict with law and evidence; and on error in the decree as to the realty in question. This motion was overruled.

1. On a bill by the heirs and distributees of an estate against the administrator, for account and settlement, the ultimate question is, what are the assets remaining after all liabilities are deducted? To determine that question, it is necessary to ascertain what should be counted as assets, and what as liabilities. If, for this purpose, the condition and accounts of some other estate ought to be examined, the ex-

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amination may be called for as a part of the general case. The complainants framed their bill on this theory, demanded full discovery, and obtained it. The result being apparently favorable to the defendant, they sought to cut off one branch of the case by an amendment to the bill, and thus deprive their adversary of the benefit of all the discovery which he had made in respect to that branch. This was to make the defendant their witness, and then turn their backs on his testimony. With, as without the amendment, the defendant was entitled to use his answer as evidence, so far as it was responsive, and to take the benefit of it so far as the responsive matter was a defense, in whole or in part, to the bill as left standing. The principle is, that after obtaining discovery, the effect of it is not to be avoided by merely striking out a part of the bill and retaining the balance. After discovery is obtained it is too late to waive it: 50 *Georgia Reports*, 53. See, also, Code, section 4190.

2. Besides contending that the amendment turned the subject matter of over-payments out of the case, the complainants urged that the defendant's discharge as executor closed his accounts, as such, and that he could not re-open them for the purpose of claiming credit for any balance that the returns might show in his favor. If this position as to the effect of the discharge, had been taken in resistance to an effort originating with the defendant to bring in the accounts, there might be force in it. There seems to have been an incomplete settlement between the executor and the legatee, treated by both as partial and provisional only. Afterwards, without any further reckoning or payment, the legatee seems to have given a receipt in full, which receipt was used by the executor in obtaining his letters of dismission. Under these circumstances, it might not be unreasonable to hold, that the effect was, to close the accounts on both sides, and that neither the executor nor those claiming through the legatee could re-open them, except for fraud or mistake, unmixed with negligence. The judgment dismissing the executor might operate equally for and against him in putting to rest all question of no

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unbalanced accounts being left between him as executor and the legatee, and might be conclusive that all funds which he administered or paid over as a part of his testator's estate were so in fact. The payments now claimed to have been over-payments, could be presumed to have had some influence on the ordinary in granting the discharge. They were a part of the evidence on which it was granted, for they were set out in the executor's returns. If the executor could withdraw from the operation of the judgment a part of its foundation, and still leave it standing in his favor, where would be the limit to this process of *pulling out*? If some of the payments could be recovered back as unaffected by the judgment, why not all of them, so far as any impediment offered by the judgment is concerned? Moreover, the executor had the benefit, before the ordinary, of the legatee's final receipt in full. Would that receipt have been given except as a sequel to *all* the prior payments? With the payments standing as they were made, the legatee would probably be less careful to see, before receipting in full, that the executor had charged himself with all the assets which came to his hands; and, especially, would the amount of the payments, with no notice that any part was to be re-claimed, operate to prevent any cause from being shown against the application for discharge, though good cause, if the payments had been less, might exist. After the executor's discharge, why should over-payments be any more in his reach than deficient payments would be in the reach of the legatee? Were the legatee to sue for payments that *ought* to have been made, but were not made, the judgment of discharge would be a bar in favor of the executor. Why, then, when the executor reclaims payments that *ought not* to have been made, but were made, should not the judgment of discharge be a bar against him? The reply, if any there be, would have to rest on the theory that what is adjudicated when a discharge is granted, is simply that all the estate has been administered, and that those entitled to it have received it. Where this appears, the executor or administrator is en-

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titled to have letters of dismission (it may be said) whether over-payments have been made or not. Thus, nothing is adjudicated as to over-payments—they are entirely irrelevant and immaterial, since, with or without them, the judgment would be the same. The judgment speaks affirmatively that enough has been paid, but is silent as to more than enough. Such a reply has the look of strength about it. We need not now hold it sufficient, however, for both parties went behind the judgment voluntarily, and thereby waived the bar of it, once for all, in this litigation. After the complainants have helped to bring the truth into court, how can they say that it has no business there, and that the defendant is estopped from having it there and using it? The judgment was matter of record, and the complainants might and should have known of it, and if they meant to insist on it, should not have run over it in the beginning.

3. The charge of the court on the subject of overcoming or discrediting the defendant's answer as evidence, was correct as far as it went. It gave the general rule, and in addition thereto, stated that the consistency or inconsistency of the answer was to be regarded and passed upon. The effect of conflict with documentary evidence should have been suggested by counsel and some request made to charge thereon, if counsel contended that such conflict existed.

4. The master's report proves the facts and conclusions of fact stated therein, until shown to be untrue or erroneous in respect to the matters controverted by the exceptions. The property of being evidence to this extent is inherent in the report. The report cannot go to the jury for any purpose without bearing that property along with it.

5. It is doubtful whether, if an exception be true in part and false in part, it can be sustained at all. But the court is certainly justifiable in dealing with each exception as a unit, unless requested by counsel to consider them as divided into parts. No request was made of the court to instruct the jury that they might, if they thought the evidence warranted it, find such or such a part of an exception sustained, and the

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balance not sustained. That the court failed, not refused, so to instruct, is the point of the complainants' objection to the charge touching the form of the verdict. We do not think the point well taken.

6, 7, 8, 9. In respect to the Confederate bonds turned over by the executor to the legatee, we think the court's charge was erroneous. The authority of the executor to invest in such securities need not be considered; for the legatee, when of full age, ratified the investment by accepting the bonds as a part of the estate of her father. The latter having died before the war, she must have known that these bonds were not original assets. As she made no complaint of the investment, her heirs cannot be heard to complain of it now. The bonds represented what went into them—nothing more, and nothing less. The effect of turning them over was, therefore, to discharge the executor from otherwise accounting for the original assets, their proceeds and accumulations, so invested. It was not to make the legatee his debtor, but to perform his obligation, as trustee, to surrender a trust fund. The bonds had never been his property, beneficially, and he was not making a sale of them, but a delivery to the true owner. If this was not the truth of the case, and the bonds really represented the executor's money, and not money of the estate, then indeed were they the property of the executor. But there is no trace in the evidence of his having so informed her; or of any contract between them for a sale of the bonds. It is scarcely credible that she could have understood that she was purchasing such bonds from him; and it is utterly incredible that she intended to purchase, or he to sell them, at par in good money. The receipts which were given for them tend to negative any suggestion that there was a sale at all. But suppose they were his, and he sold them to her, what ought her estate to pay for them? Certainly not more than their real value, with interest, unless a different price was expressly named and assented to; the burden of proving which would rest on him. Whenever she, after arriving at age, received a dollar of the estate, whether in its first form, or any succeed-

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ing form into which it had been changed, the executor was discharged to the extent of one full dollar; but when she received, if at all, a dollar belonging to the executor, the value of the so-called dollar became the measure of his credit, or of her debit, unless a different measure was agreed upon. In other words, a dollar of the estate on both sides of the executor's account ought to balance, however depreciated it might have been when the legatee received it; but a depreciated dollar of his own, without some express agreement in regard to it, should not cancel his debit for an undepreciated dollar belonging to the estate. It should cancel of the latter a part equivalent to its own real value, and no more. Or, if it was a sheer over-payment to the legatee, in excess of any assets charged, or chargeable to the executor, then, in reclaiming it, he should recover its real value at the time the legatee received it, with interest. That would be exact equity to both parties. The court's charge on the subject, should have been in substantial conformity to these views. On the state of facts in evidence, it was error to submit the question of whether the bonds were received as good money. They were received, not as money, good or bad, but as bonds; and it made no difference what sort of money went into them; though it did make a most important difference whether that money really belonged to the estate or to the executor. If, in instructing the jury to look to the final receipt in full, given by the legatee to the executor, the court meant to suggest that it was, or might be possible to draw from that receipt any support, whatever, in aid of the hypothesis that the bonds were received as money, and at their nominal amount in good money, the court erred in this part of the charge, also. We think, too, that as the pleadings stood, it was not appropriate to instruct the jury that the receipt was subject to be reopened. The complainants having amended their bill, renouncing all claim upon the defendant in his character of executor, there was, or ought to have been, no dispute that the receipt in full was, as far as it went, a correct and proper receipt. We do not understand that either party sought at

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the trial to reopen it. The defendant contended that, as executor, he had paid the legatee in full and over-paid her. The complainants admitted that he had paid her in full (and to that extent went the receipt) but denied that there had been any over-payment. Both of these positions were consistent with the receipt. The receipt said there had been full payment. The complainants said so too; and the defendant said there had been that and more. On the question of more, the parties were at issue. If, by reopening the receipt, the court meant simply, that the defendant was not, by accepting the receipt, concluded from proving his over-payments and having a proper allowance for them in this case, the idea in the judge's mind was quite correct. But if this was the meaning, it should have been more distinctly expressed. In construing the receipt and ruling upon its character and effect, we notice, of course, that it is a document relating only to business affairs between the parties to it, as legatee and executor. It does not purport to deal with their relations as principal and agent. What had been previously received for by the legatee and left in the defendant's hands as her agent, would be as subject to be called for by her or her legal representatives after this receipt was given as before. Her receipt in full to the executor, as such, signifies that all of her father's estate to which she was entitled had been turned over to her, and that she had no further claim upon him connected with the trust imposed by her father's will. What claim, if any, she may have had upon him as an individual, or as her agent or bailee, the receipt does not pretend to speak. In regard to that part of their business, it is utterly silent.

10. That the executor ever advanced any of his own money for the benefit of his testator's estate, is not declared expressly on the face of his annual returns. It is but an inference from the state of his accounts, comparing the amounts received with the amounts paid out. His answer to the bill, does not specify the various sums advanced, or give the precise dates at which advances were made. From some of the results arrived at by the master in his report, there is strong proba-

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bility that some part of the large balance appearing in the executor's favor, on aggregating his returns, grew out of contributions from his own funds, made during the late war, and either invested in Confederate securities, or applied in payment of current expenses, such as taxes, support and maintenance of the two daughters of the testator, etc. As to any money of the executor which may have been invested in Confederate securities, we have already seen that the securities would not be the property of the estate, although so treated by the executor, and that the credit therefor to which he would be justly entitled would be no more than their actual value at the time of turning them over. The same principle would apply to any advances rightfully made by him in paying expenses. If they are credited to him, as of the proper dates, at their then real value (adding interest if they were in excess of all his proper debits), he will have the full measure of his rights. If he advanced depreciated currency, it was paid out as depreciated currency, and expenses thus defrayed must have been nominally more than they would have been if a better currency had been used. Therefore, the benefit to the estate, or to the testator's daughters (the legatees), must have been less from each and every dollar, than it would have been if the money had been good money. If, contrary to the probabilities of the matter, whether we rest upon the public history of the times or the just inferences from the evidence in the record, he advanced and used *good money* to pay expenses in 1863, 1864, and the early part of 1865, he should not only prove the fact, but should, moreover, reconcile it with the large aggregate of expenses in each of those years, and with the inflated prices which his vouchers exhibit as to many of the particular items. Money belonging to the estate, and used for its benefit, is not to be scaled; but money put in by the executor is to count only for what it was worth. What has already been said in respect to the difference between bonds of the estate and bonds of the executor, is equally applicable to currency paid out as expenses.

11. Allowing there to be a balance in favor of the execu-

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tor on a proper adjustment of his executorship accounts, as a whole, such balance would, of course, not all be chargeable to one of the legatees. Thus charging it by the master in his report, was, at the hearing, conceded to be erroneous, and the report was so far corrected as to debit the estate of Violet B. with one-half, instead of the whole of the balance found. This was recognizing the position taken in the third exception of law. But as Violet B. received, or had the benefit of more, and her sister of less, than half, the report added to Violet B's debit of one-half, the whole difference between them; that is, the whole amount which she received or had the benefit of in excess of what her sister received or had the benefit of. This addition was too much, even if the figures used had been otherwise correct. It was just double what it should have been. No sum or quantity can be divided unequally into two parts, one of which shall be equal to half of the whole and the whole of the difference between the parts themselves. If an account be chargeable severally to two persons, in the proportion each was benefited, each should be charged with half of those parts of the account which accrued for joint and equal benefit, the whole of those parts which accrued for sole benefit, and a *pro rata* proportion of such parts as accrued for joint but unequal benefit. If gone through with in detail and each item or group of items dealt with separately, this would be the principle of classification in respect to each and every dollar. But the same general result would be arrived at, if, knowing only the aggregate of the account, and the aggregate of the excess received by one of the persons over the other, we should take half of each of these aggregates and add them together to find the amount chargeable to one of the persons, and subtract half of the latter aggregate from half of the former (that is, half of the excess from half of the account) to find the amount chargeable to the other person. It is only a truism that, for a sum to be composed of any two quantities, both must be equal, that is, each must be precisely half of the sum; or else one must exceed, and the other fall short of half, not by the difference between the

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two, but by half of that difference ; that is, by the difference between either and the half of both.

12. If each legatee got more than she was entitled to, it would be a singular consequence that one of them should have to refund to the other, and not to the executor. How could a legatee who had been overpaid, herself, complain that another got more than she ? We can see no possible relevancy to this case, in anything which has been done or omitted, or which might have been done, in relation to settling up the estate of the younger sister. There is no pretense that her estate, or that the defendant as representative thereof, is chargeable with anything, or that that estate has not been fully and finally administered. The defendant is not now contending that one sister's estate owes the other's estate, but that both estates severally owe him ; and he seeks to recover out of one of them what it owes, and no more. That, in settling up the other, he made no similar claim upon it, is his own concern. That he waived his rights in respect to that estate, does not oblige him to do the like in respect to this.

13. Touching the statute of limitations, as a bar to the allowance of the claim for over-payments, we need say only, that we do not think a creditor's claim can become barred while he is the sole administrator upon his debtor's estate. As he cannot sue himself, the statute does not run ; and we are not aware of any law that compels the exercise of the right of retainer, on pain of forfeiting it, within any specific time after taking out administration.

14. We do not regard the administrator's inventory as inconsistent with his position, that he was a creditor in possession of the personality, with a right, by contract, to treat it as security for his debt. Whether the property was thus burdened or not, it is equally the property of the intestate's estate, and the inventory is still true. The administrator does not object to administering the personality, but what he wants is, to take the proceeds as a creditor. Whether he can do that or not, will depend in no degree on contradicting the inventory. In like manner, the inventory, as to the realty also,

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corresponds with the state of the title, as will be seen below, for which reason there need be no consideration of what its effect might have been, by way of estoppel upon the administrator, if the true title had been at variance with it.

15, 16, 17. We think that the testator intended to, and did, die testate as to his whole estate. After completing specific devises and bequests, he adds: "All the residue of my estate of every sort and kind not disposed of above, I give to my two daughters above named, in equal shares when distributed." The clause containing the specific devise and bequest to his daughters (omitting introductory matter) reads thus: "I therefore bequeath and devise to my executor, S. C. Ellington, in trust to and for the sole and separate use of my two daughters, Violet B. and Ann E., for and during their natural lives, and at their death, to their children, respectively, to be subject to the debts of no person whatever, the tract of land (describing it) and (certain personality, describing it) to be held and managed by my executor until my eldest daughter arrives at age, or marries, after which event, I desire all this property divided between my said daughters in equal shares. Should either of my said daughters die without child or children, such property shall revert to and belong to the other sister." When the younger daughter died, her interest in the whole property embraced in this clause ceased, and the survivor stood as if she had been alone originally. The property *reverted* to her, and, construing both clauses of the will together, she then held the whole, with a contingent remainder to her children interposed between her particular estate for life, and her reversion in fee. Technically, perhaps, the particular estate would be in the trustee for her benefit, and the reversion not in the trustee, but properly in herself. At all events, while she lived, the contingent remainder was not drowned out. Her estate was the equivalent of a fee, subject to be cut down by the remainder. When she died without children, the fee, unimpaired by the contingent remainder, descended to her heirs. It is not certain that aid is needed from the residuary clause of the will, to pass

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the reversion into the surviving sister, as to the whole of the specific property. But if needed, we think that clause may be invoked. The failure of a remainder to become vested, which the testator must have known, and not merely may have known, might never vest, is not like the ordinary case of a void or a lapsed devise. When the testator created a remainder in favor of children unborn, he must have known that they might never be born, and hence that the remainder was necessarily contingent. On the state of facts which he knew to exist at the time the will was made, he knew that there was a reversion as to this specific property. But intending to leave none of his estate undisposed of, he proceeded to dispose of this reversion effectually in the residuary clause, if he had not already done so in the previous clause. When a reversion *may* be incident to a specific devise, the testator may be supposed not to have contemplated it; but when it *must* be incident, and cannot possibly be otherwise, the presumption should be that he had it in mind, and that language used by him, sufficiently comprehensive to dispose of it, was used with that intent: See 1 Jarman on Wills, 591, 592, 593; 1 Mau. & Sel., 300; 1 B. & Adol., 186; 6 Paige Ch., 600. On this view of the matter, the distinction is evident between the present case and that in 50 *Georgia Reports*, 523. It is proper to suggest that, as to the specific property in question, whatever interest in the reversion passed temporarily to the younger sister, under the residuary clause, was, on her death, without children, terminated or carried over by virtue of the previous provision that "such property shall revert to and belong to the other sister."

It is full time to close this already too lengthy opinion. We need not apply its principles to all that was done or said by the court, and which has been complained of as error, approving or disapproving everything in detail. The application will, we trust, be sufficiently obvious for all practical purposes. Let the decree be set aside, and a new trial granted.

Judgment reversed.

Irvin *vs.* Corbin.

SAMUEL D. IRVIN, plaintiff in error, *vs.* **JAMES W. CORBIN**, defendant in error.

1. Exceptions to rulings not taken in the court below, and not stated as grounds of the motion for new trial, cannot be considered by this court, though set forth in the bill of exceptions. (R.)
2. This court will not control the discretion of the presiding judge in granting a new trial on the sole ground that the verdict is contrary to the law and the evidence, unless the record clearly discloses that the law and the evidence required the verdict, and that the judge had thus abused his discretion.

New trial. Before Judge HALL. Spalding Superior Court. August Term, 1875.

Reported in the opinion.

J. D. STEWART; R. F. LYON; SAMUEL D. IRVIN, for plaintiff in error.

A. M. SPEER; D. N. MARTIN, for defendant.

JACKSON, Judge.

This was a bill in equity filed by Irvin against Corbin, to enjoin a judgment obtained by Corbin against one Jackson, who had been garnisheed to answer how much he owed one Mathews, and having failed to answer, judgment had gone against him as garnishee. The allegations are that Irvin was the innocent purchaser of the land of Jackson, which was levied upon by the judgment in favor of Corbin, without notice of the judgment; that the original judgment against Mathews was illegal for many reasons; that the judgment against Jackson, the garnishee, was also illegal for many reasons; and that Irvin having bought in good faith, had expended moneys in improvements upon the premises, in expenses for the last illness of Jackson, and counsel fees in and about the premises before he purchased them, which ought to be paid back to him; and that he had paid the widow of Jackson some \$900 00 balance due on the land,

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which was set apart for her year's support, and that he ought to be protected in that. The jury, under the charge of the court, found for the complainant, and a decree was had perpetually enjoining Corbin's judgment. A motion was made for a new trial on the ground that the verdict was against the law and evidence, which was granted by the court, and Irvin, the complainant, excepted.

1. In the exceptions are many complaints here of improper and illegal rulings by the court below on the admission and rejection of evidence, and in regard to the charge; but the judge says that these were not in the motion for a new trial, were not complained of below, and not excepted to *there*; and that more than sixty days had elapsed before they were complained of at all to him. Of course we cannot hear them, for the reason, if no other, that they are not certified to, but the judge expressly declined to embrace them in his certificate.

2. So that the question is narrowed to this: Is the verdict so clearly and fully supported by the evidence and the law, as to require us to overrule the discretion of the presiding judge in granting a new trial? We cannot say that it is; no great harm can be done by a new hearing; the presiding judge was dissatisfied with the verdict; the record is somewhat confused and uncertain; and in accordance with our uniform and numerous rulings to this effect, we will not control the discretion of the presiding judge in the premises.

It is, perhaps, well to add for reference, that this case, or a branch thereof on a prayer for injunction, was before this court on a former occasion, reported in 39 *Georgia Reports*, 103; but nothing then decided affects the simple question now made.

Judgment affirmed.

Wilson *vs.* Paulsen & Company.

WILLIAM WILSON, sheriff, plaintiff in error, *vs.* JACOB PAULSEN & COMPANY, defendants in error.

1. Though an attachment commanding the seizure of the defendant's property, specify, in general terms, of what it consists, still, the officer can levy it only upon property of the defendant, and is not authorized to seize property of the like kind belonging to another person, though the defendant has lately sold it.
2. When a commodity is priced, and is to be paid for, by the bushel, though the bargain be for such quantity as will make a cargo for a certain vessel brought by the purchaser to carry it away, the parties may, by mutual consent, upon being interfered with by an officer, stop lading with less than a cargo on board; and in that case, the delivery will be complete as to so much as is actually on board, and under the exclusive control of the purchaser.
3. On the facts in evidence, the verdict of the jury was correct, and even if there were slight errors of law committed by the court, there was no abuse of discretion in refusing a new trial.

Attachments. Levy and sale. Sales. Before Judge CHISHOLM. City Court of Savannah. February Term, 1876.

Wilson, sheriff of Beaufort county, South Carolina, brought trover against Jacob Paulsen & Company, to recover five hundred and one bushels of rice which he claimed by virtue of a levy made upon it by his deputy. Defendants pleaded the general issue.

On the trial, the evidence for plaintiff was, in brief, as follows:

One Walls rented from J. J. P. Smith a place in Beaufort county, South Carolina, known as the Beach Hill place, and situated on the Savannah river, where he raised a large quantity of rice. Finding that this was being removed before the payment of rent, Smith sued out an attachment, which commanded the sheriff to "attach and safely keep all the property of the said defendant within your county, consisting of rice, steam engine and thrasher, mules, flats, implements of husbandry, and other articles of personal property in the hands, possession or control of the said J. E. Walls or any other person, or so much thereof as may be sufficient," etc. The deputy

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sheriff proceeded to the plantation, where he found the rice being thrashed and carried on board a schooner, which was lying in the river. He went on board, made an entry of levy on the rice which was there, and placed a watchman over it. In the meantime, one of defendants, Paulsen, came on board, the lines of the boat were cast loose, and it floated out into the stream. Paulsen then said that they were in Georgia water, and he would resist any attempt to take the rice. The deputy sheriff took a boat, went ashore, and entered a levy on other personal property; when he returned, the schooner was gone. It proceeded to Savannah where the rice was unloaded. There were five hundred and one bushels, and it was the rice raised on the Beach Hill place. Paulsen expressed great anxiety on the evening of the levy to get his schooner loaded and away before the rice should be seized under attachment; he arrived in the morning of that day with his vessel; he and Walls seemed much excited; he stated that he would run the rice-mill day and night—which was unusual on account of the danger—so as to get all the rice away, and that he would pay the hands if Walls failed to do so.

The evidence for defendants was, in brief, as follows:

Walls and one Green were in partnership, owning together a store in Beaufort county. Green made arrangements with defendants to purchase goods for Walls & Green, and that firm were indebted to defendants for goods so purchased. Walls borrowed money from Green and secured its payment by a mortgage. On this was credited, every Saturday night, half the amount of the week's sales. Desiring to pay off the firm debts, Green threatened to foreclose his mortgage unless Walls would let him have all the rice on the plantation to assist in making such payment. To this he agreed. Green thereupon arranged with defendants that they should give his firm credit for all the rice he could deliver on board their schooner; and he agreed with Walls to take all the rice he (Green) could thrash on "that night," that is the night of the levy. One boat load was carried away by Paulsen; when he returned for the last load there was not quite enough rice

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thrashed to fill the boat ; it was therefore determined to run the mill all night, if necessary, to pay the debt to defendants. The cargoes were taken at \$1 55 per bushel. Defendants considered the rice theirs as it was delivered on the schooner. The sale of both cargoes did not pay off the debt to them. Green told Paulsen that if he allowed the sheriff to take the rice on the schooner, he would do so at his own risk. Paulsen heard there would be some trouble about the rice ; he was also anxious to return to Savannah ; hence the haste exhibited. The lines of the boat were cast loose because the negroes collected on a flat-boat next to schooner, and began calling out to the sheriff, so as to arouse the fears of Paulsen that they would assist in taking the rice. The rice carried away was all delivered on board the vessel before the levy, which was made about dusk in the evening.

The evidence for plaintiff, in rebuttal, consisted of a denial of any demonstration by the negroes, and a statement that Green said, on the day after the levy, that he had nothing to do with the crops or plantation ; this was denied by Green in his testimony.

The jury found for defendants. Plaintiff moved for a new trial on the following, among other grounds :

1st. Because the verdict was contrary to law and the evidence.

2d. Because the court charged as follows : "If you find that plaintiff, by himself or deputy, levied on this rice in South Carolina, he has a right to maintain this action of trover, if you further find that the defendant in the attachment or process, by virtue of which the levy was made, had, at the time of the levy, any property in the rice."

3d. Because the court charged the jury as follows : "The said sheriff or his deputy, by virtue of said attachment or process, could levy on the property of John E. Walls only ; and if, at the time of said levy and seizure by the deputy sheriff, Sams, the title to said rice was not in the said Walls, and was in defendants, Paulsen & Company, the said defendants had a right to hold possession by any means in their

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power, and were not compelled to assert their rights in the court issuing the attachment in South Carolina."

4th. Because the court charged substantially as follows : If there was no subsisting debt between Walls, or Walls & Green, and defendants, at the time of the delivery of the rice to them, and they did not receive it in payment or part payment of such debt, but for the purpose of aiding Walls to defraud his creditors, then the transfer was void as against plaintiff, and he is entitled to a verdict. Or if, at the time of delivery of the rice, defendants paid cash, or any valuable consideration other than a receipt or credit on account of a *bona fide* subsisting debt, then such a transfer would be void as against the plaintiff, representing a creditor, if the jury should find further that, at the time of the transfer, defendants had notice, or grounds for reasonable suspicion, that said transfer was made with the intention to delay or defraud creditors ; and upon this question acts of defendants in endeavoring to get the rice away from the possession of Walls, or Walls & Green, may be considered.

5th. Because the court charged as follows : "If you find that Walls, or Walls & Green, were, *bona fide*, indebted to Paulsen & Company, in a valid subsisting debt, and desired to transfer said rice to them in extinguishment or part payment of the same, and the defendants had, in pursuance of said desire, actually received on board their schooner a portion of said rice, they obtained a good and valid title thereto, although the said transfer would operate to deprive other creditors of Walls, or Walls & Green, of all means of obtaining payment of their debts, and this fact was, at the time, known to Paulsen & Company."

The motion was overruled, and plaintiff excepted.

W. U. GARRARD, for plaintiff in error.

R. E. LESTER, for defendants.

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BLECKLEY, Judge.

If there was any error committed in the trial of this case, it was harmless, for the verdict was the proper outcome of the law and facts involved in the litigation. The principles ruled are stated at large in the head-notes.

Judgment affirmed.



HINES DOZIER *et al.*, plaintiffs in error, vs. BENJAMIN H. WILLIAMS, defendant in error.

Where the record fails to show that any judgment has been rendered in the court below, this court will not award damages for bringing the case up for delay only.

Damages. Practice in the Supreme Court. Before Judge CRAWFORD. Harris Superior Court. April Term, 1876.

Reported in the decision.

THORNTON & WILLIAMS, for plaintiffs in error.

BLANDFORD & GARRARD, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants, on a forthcoming bond for the delivery of property on the day of sale. When the case was called here, the plaintiffs in error made a motion to withdraw their writ of error. The defendant in error objected, and moved the court to be allowed to open the record for the purpose of claiming damages under the statute for bringing the case here for delay.

The motion for a new trial is not in the record, and the alleged error in the charge of the court is not sufficient to authorize a reversal of the judgment. Upon looking into the record we find a verdict in favor of the plaintiff in the court

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below, but no judgment thereon signed by anybody. There is the form of a judgment in the record, but it is not signed by any one, and therefore there is no judgment that will authorize this court to award damages thereon as provided by the 4286th section of the Code.

Let the judgment of the court below be affirmed.

**CALVIN BROACH, plaintiff in error, *vs.* IRENA S. BARFIELD
et al., defendants in error.**

1. In 1874, there was no law in Georgia making usurious any agreement, written or verbal, for any rate of interest whatever.
2. An absolute deed to land, made in January, 1874, by a widower to two of his creditors, to secure his indebtedness by note to each of them, they giving him a bond for titles, conditioned to reconvey on payment of both notes, passed the legal title.
3. Such title was not divested by the subsequent voluntary bankruptcy of the grantor, and his consequent discharge from all his debts.
4. Nor was it divested by his causing the land to be set apart in bankruptcy as his homestead exemption, he being the head of a family of children.
5. Nor was it divested by the grantees' filing, in the bankrupt court, objections to the allowance of such exemption, nor by the pendency of such objections, nor by an adjudication adversely to the objectors, they not having proved their debts as claims against the bankrupt's estate.
6. Special pleas to an action of ejectment which present no sufficient defense, ought to be stricken.
7. To redeem land, held by absolute legal title as security for a debt, the debt must be paid or tendered; and, generally, a tender will be effective, though delayed till after the creditor has recovered possession of the premises by action.

Ejectment. Usury. Deed. Bankrupt. Homestead. Judgments. Pleadings. Tender. Debtor and creditor. Before Judge BARTLETT. Jones Superior Court. April Term, 1876.

Irena S. Barfield and Mary A. Turner brought ejectment to the October term, 1875, of Jones superior court, against Calvin Broach for certain land. The defendant pleaded, in substance, as follows:

1st. The general issue.

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2d. The deed under which the plaintiffs claim title was dated January 23d, 1874, and was executed by the defendant to secure the payment of two notes, bearing the same date, and to become due twelve months thereafter. At the time the deed was delivered, plaintiffs executed their bond to defendant conditioned to make titles on the payment of the aforesaid notes. The deed and bond for titles constitute nothing but a mortgage. The title never was intended to pass. The value of the land is far in excess of the debt.

3d. The defendant had been adjudged to be a bankrupt prior to the commencement of this suit, and was discharged on November 30th, 1875. The debt due the plaintiffs was in existence at the time, and was provable in bankruptcy. He therefore pleads his discharge in bar of this suit.

4th. On February 20th, 1875, the land in controversy was set apart to the defendant as a homestead, by the assignee in bankruptcy. On March 4th thereafter, the plaintiffs appeared before the register in bankruptcy and filed exceptions to the setting apart of such homestead, which involved precisely the same questions as are now made in this case, and these exceptions were pending at the time of the commencement of this suit. Wherefore the defendant pleads the pendency of the case thus made before the register, in bar of this action.

5th. The plaintiffs appeared before the bankrupt court for the southern district of Georgia, and filed exceptions to the judgment of the assignee (?) setting the land apart as a homestead. A hearing was had before the register and the homestead approved, notwithstanding the objections. Subsequently the defendant was discharged, his homestead having been allowed. He therefore appends a transcript of the record of these proceedings and pleads the same in bar as *res adjudicata*.

6th. He agreed, verbally, to pay twelve and a half per cent. interest on the notes. This stipulation was not incorporated therein. He therefore pleads usury.

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Upon demurrer, all of the aforesaid pleas were sticken except the first and last.

The evidence presented, in substance, the facts set forth in the second and last pleas. It was also shown that the defendant had no wife at the time of the execution of the aforesaid deed, though he had a family of children.

The jury found for the plaintiffs. The defendant moved for a new trial upon the following grounds:

1st. Because the verdict was contrary to the law and the evidence.

2d. Because the court erred in striking the defendant's pleas as above stated, and in holding that he could not set up his equitable defense without tendering the money to secure which the deed was executed.

3d. Because the court erred in charging that there was no usury law in Georgia when the deed was made, and therefore there could be no usury in the contract.

The motion was overruled, and the defendant excepted.

LANIER & ANDERSON; HILL & HARRIS, for plaintiff in error.

POE, LOFTON & BARTLETT, by SMITH & JACKSON, for defendants.

BLECKLEY, Judge.

1. Georgia, for a brief period, tolerated free trade in money. While the act of 1873 (pam., p. 52,) was in force, conventional interest was unlimited. Any rate for which the parties might stipulate was allowable. It is true, that to make the contract obligatory beyond seven per cent., the promise, as to the excess, had to be in writing; but there was no prohibition upon parol promises. They were not treated as tainted or corrupt, but simply as not obligatory. It was no more illegal to make them than to make a will without three witnesses, or to make a promissory note without any consideration, or to make the promise of a future gift. They were impotent, but harmless—null, but not noxious. Wanting in the prescribed

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authentication by writing, they were as if they had never been. To the legal idea of usury the element of invalidity is not sufficient; there must be the further element of illegality. Usury is not a neutral, but an enemy. The act above referred to repealed, expressly, all laws upon the subject of usury.

2. In the light of the Code, section 1969, of 54 *Georgia Reports*, 45, and of 55 *Ibid.*, 650, it can scarcely be considered an open question that an absolute deed passing the legal title, may be made as security for a debt. The point now raised is that the debtor's wife did not sign the deed or consent to it. But he had no wife. Surely that is a sufficient reason for the omission.

3. The adjudications above referred to, as well as that found in 55 *Georgia Reports*, 412, recognize the sufficiency of such a deed to maintain ejectment. If sufficient before bankruptcy, there is no reason why it should not be afterwards. Bankruptcy does not divest any person of title but the bankrupt himself. It does not strip title off of other people and clothe him with it. It is, as to debtors, a means of surrendering property, not of acquiring it. It will not even remove incumbrances. Mere liens will adhere to the bankrupt's effects, unless creditors choose to surrender them. Discharge from the debt does not work extinction of a lien. How, then, can it extinguish an outstanding legal title?

4. That the land was set apart in bankruptcy to the bankrupt as his homestead exemption, is equally unavailing to invigorate his title. He acquired no new or additional property in the land by claiming it as exempt and having it allowed to him. He simply continued to hold as he had held before: See 55 *Georgia Reports*, 579. His interest in the land was the right to have a conveyance, according to the bond for titles, upon paying what he had bound himself to pay. Cut down his interest to its real proportions, and there is no conflict between the disposition made of the land in bankruptcy, and the title to it now asserted by the plaintiffs in ejectment. The plaintiffs challenge the bankrupt's title, not his exemp-

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tion. They grant that all he has is exempt, but they make the troublesome question that, as against them, the land does not belong to him.

5. That the bankrupt held a bond for titles and claimed the land as his homestead exemption, furnished a sufficient basis for all that was done in reference to the land by the court of bankruptcy. Whether the objectors had the title paramount or not, they had no footing in that court, for they had not proved any claim against the bankrupt's estate. They, however, did not lose their title by appearing there and interposing objections, whether the objections were overruled or left undisposed of. What they did, was simply idle, for whether the exemption was worth anything or not, the bankrupt had a right to have it recognized by that court. To recognize the exemption and overrule objections to it, was to adjudge nothing but that the land ought to be left as it was and not be brought in as assets for administration in bankruptcy. What else is signified by exemption in bankruptcy?

6. The principles of this opinion, thus far, will be found comprehensive enough to dispose of all the special pleas, none of which amounted to a defense to the action, and all of which should, therefore, have been stricken. To try the truth of an insufficient plea is a waste of time.

7. The defendant could have made out a good defense to the action by paying or tendering the money due on his notes. That would have made his equity complete, but without that it was incomplete. We see no obstacle to his becoming entitled to re-enter, even after eviction under the judgment, by paying or making a tender of the money. Let him do equity and have equity.

Judgment affirmed.

*JOSEPH ELSAS, plaintiff in error, *vs.* J. B. MOORE, defendant in error.

[*No reports or opinions are published in this and the following cases, in accordance with the provisions of act of March 2d, 1875.] (R.)

Walker et al. vs. Miller et al.

JOHN H. WALKER et al., plaintiffs in error, vs. JAMES A. MILLER, administrator, et al., defendants in error.

NOBLE BROTHERS & COMPANY, plaintiffs in error, vs. P. H. LOUD, defendant in error.

THE GEORGIA RAILROAD AND BANKING COMPANY, plaintiff in error, vs. JOHN M. ZACHRY, defendant in error.

JERRY UFFORD, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

MONROE HAMPTON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

The discretion of the court below, exercised in granting or refusing a new trial, will not be controlled unless manifestly abused.

PETER H. COFFEE, administrator, defendant in error, vs. JOHN W. GRIFFIN et al., defendants in error.

When the bill alleges that the administrator of an estate is seeking to enforce a judgment against the heirs, that the administrator and securities are insolvent, that there are no debts to pay, that the administrator is himself largely indebted to the estate, that the shares of the heirs, whose land is levied on to pay the judgment, are largely in excess of the amount of the judgment, that the notes sued to judgment were for land sold at administrator's sale and were to be accounted for in general settlement, but not pressed to collection, that the plea of the heirs to that effect was withdrawn on the assurance that the judgment would merely stand in lieu of the notes, and that the provisions in the notes, one in writing and the other left out by mistake, would in good faith be carried out:

Held, that there is equity in the bill, and though the answer denies the allegations therein, yet if there are affidavits and counter-affidavits for and against those allegations, this court will not control the discretion of the chancellor in granting an injunction until the whole case can be tried on its merits: *20 Georgia Reports, 96; 36 Ibid., 666; 40 Ibid., 245.*

JACKSON, Judge.

Davis *vs.* Howard.

LARKIN H. DAVIS, administrator, plaintiff in error, *vs.* THOMAS C. HOWARD, defendant in error.

1. When a motion for a new trial has been fully argued, it is too late to move to *dismiss* it because the order fixing a time for the hearing has run out.
2. As the charge of the court extends to great length, and the exceptions thereto in the motion for a new trial are numerous, and the court has granted a new trial generally, this court will not control the discretion of the presiding judge and prevent him from submitting the case to the jury under more mature instructions. The charge can be better reviewed, with full justice to both parties, after it has been condensed and more deliberately shaped on a second trial. The novelty of the case, in some of its elements, justifies extraordinary care in working out the principles that control it.

BLECKLEY, Judge.

JAMES MCANDREW, plaintiff in error, *vs.* THE AUGUSTA MUTUAL LOAN ASSOCIATION, defendant in error.

The record and bill of exceptions in this case failing to set out the petition, the rule *nisi*, or rule absolute, or other final judgment of the court below, from which an appeal could be taken to this court, the writ of error is dismissed in accordance with the ruling in *Bean & Company vs. Hadley*, delivered at the present term.

JACKSON, Judge.

EAST ROME TOWN COMPANY, plaintiff in error, *vs.* G. W. NAGLE *et al.*, defendants in error.**WILLIAM A. CRUTCHFIELD, plaintiff in error, *vs.* SAMUEL F. COLEMAN, defendant in error.****THOMAS PHIPPS *et al.*, plaintiffs in error, *vs.* HAMLIN J. COOK & SON *et al.*, defendants in error.****THE MAYOR AND CITY COUNCIL OF AMERICUS, plaintiff in error, *vs.* W. W. BARLOW, defendant in error.**

The discretion of the chancellor, exercised in granting or refusing an injunction, will not be controlled unless manifestly abused,

Lynch *vs.* Gannon.

PATRICK H. LYNCH, plaintiff in error, *vs.* WILLIAM GANNON, defendant in error.

1. An affidavit of illegality cannot go behind the judgment. Any defense arising before a judgment must be pleaded before judgment.
2. Where the defendant in *f. fa.* alleged and swore that he made a contract, before judgment, with the attorney of plaintiff, to take certain accounts of the defendant in payment of the debt, and was told by the attorney that he need not trouble himself more in the court about the case, and that judgment was taken against him notwithstanding the agreement, and that after judgment the plaintiff received the money collected from some of the accounts and thereby ratified the contract, and where the attorney testified to the contrary, that the accounts were not taken in discharge of the debt, but to collect and apply to the debt as far as they would go, and the accounts themselves show that their sum, if all collected, would not have paid the debt, and the balance due was neither paid nor tendered, and that all accounts collected had been applied to the debt and credited on the *f. fa.*, and no *laches* was imputed to the attorney or the plaintiff in the collection of the accounts, so that though some were lost by insolvency they were not lost by neglect, and when defendant, himself, swore that the debt of plaintiff was honest, and failed to show that he had been deprived of any legal defense, even if his version of the contract was the true one, or had been injured in any way by the conduct of plaintiff or his attorney :

Held, that the court was right in charging, and the jury in finding against the affidavit of illegality, and that the execution was properly ordered to proceed—no case being made on the facts of any defense even before judgment, much less of any defense arising after the judgment.

JACKSON, Judge.

ANN E. DORTIC *et al.*, plaintiffs in error, *vs.* ROBERT W. LOCKWOOD, defendant in error.

Where an equity cause is tried irregularly and imperfectly, and the result is not satisfactory to the presiding judge, his judgment granting a new trial will not be reversed by the supreme court.

BLECKLEY, Judge.

Wilkinson *vs.* Smith.

**U. B. WILKINSON, plaintiff in error, *vs.* DANIEL SMITH,
defendant in error.**

1. When there is sufficient evidence to support the verdict, this court will not control the discretion of the presiding judge in overruling a motion for a new trial on the ground that the verdict is against the weight of the evidence.
2. A new trial will not be granted on the ground of newly discovered testimony, where such testimony is that of the movant's sons, and could have been known and used on the trial if diligence had been used, especially when it is in the main merely cumulative and tending to impeach other witnesses.

JACKSON, Judge.

**ALBERT G. FOSTER, administrator, plaintiff in error, *vs.*
EDMOND REID, defendant in error.**

Where the plaintiff in a judgment more than seven years old has had it revived by *scire facias*, as having become dormant, it is a lien on the defendant's property from the date of revival only; and so long as the judgment of revival is unreversed, the same having been rendered by the court having jurisdiction, the fact that the original judgment was dormant, whether true or false, is *res adjudicata*, and is not open to question on a motion to distribute money arising from the sale of the defendant's property: 9 *Georgia Reports*, 117; 10 *Ibid.*, 371; 13 *Ibid.*, 223.

BLECKLEY, Judge.

DENNIS MILLS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. The fact that the name of one of the grand jury who found the true bill was not in the jury box from which jurors were drawn, is not good ground for arresting the judgment, or for a new trial, after verdict. The objection should be made before the case is submitted to the jury: 53 *Georgia Reports*, 432, 75, 602.
2. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative, and tends, too, only to impeach the character of a witness sworn on the trial.

Smith & Company *vs.* Ehlen.

3. If the evidence, though conflicting, be sufficient to authorize the verdict, this court will not control the discretion of the presiding judge in refusing to grant a new trial.

JACKSON, Judge.

B. R. SMITH & COMPANY, plaintiffs in error, *vs.* JOSEPH EHLEN, defendant in error.

Though this court is satisfied with the verdict, and would not, on the evidence in the record, have granted a new trial, it will defer to the judge who presided, not being able to say that he abused the discretion with which he is clothed by law. The first grant of a new trial, where no controlling question of law is involved, is generally to be acquiesced in: *54 Georgia Reports, 611; 55 Ibid., 416; 56 Ibid., 249, 398.*

BLECKLEY, Judge.

LEWIS BUTLER *et al.*, plaintiffs in error, *vs.* THE STATE OF GEORGIA, defendant in error.

This case is controlled by the case of John Jordan, *alias* John Steger, *vs.* the State: *56 Georgia Reports, 92.*

JACKSON, Judge.

APPENDIX.

On April 22d, 1876, during the January term, Hon. J. A. Billups moved the appointment of a committee, he suggesting the chairman, to prepare and report, on the call of the Ocmulgee circuit, at the next term, a memorial commemorative of the life and character of Judge IVERSON L. HARRIS, deceased. It was so ordered, and the following gentlemen appointed:

Hon. CHARLES J. JENKINS,

Hon. J. A. BILLUPS,

Hon. ROBERT P. TRIPPE,

Hon. WILLIAM MCKINLEY,

Hon. SAMUEL HALL,

Hon. THOMAS G. LAWSON,

Hon. W. A. LOFTON.

On April 13th, 1877, during the January term, the following report was made, and ordered spread upon the minutes:

"To the Honorable the Supreme Court of Georgia:

"The committee appointed to prepare and report a suitable memorial to our late lamented brother, IVERSON L. HARRIS, conscious that they have inadequately performed the delicate and solemn duty imposed upon them, respectfully submit the following:

"To chronicle the death of IVERSON L. HARRIS, is to place on record the extinguishment of a bright luminary in Georgia. The attempt to sketch his life, fairly delineating his character, his intellect, and his career, though pleasant as a tribute of friendship, awakens a keen sense of responsibility.

"A native of our beloved State, reared under the influence of her social institutions, and educated exclusively in her seminaries of learning, Georgia was the theatre of his childish sports, his youthful aspirations, and his manly enterprises.

"In the year 1820 he entered Franklin College (now expanded into a State University,) maintained a high grade of scholarship throughout the course, and graduated with honor in 1823. During his collegiate course, his amiable disposition, sprightly converse, and ingenuous, manly deportment, made him numerous friends, whose constancy in after life attested both his sterling worth and their own fidelity. Choosing for an occupation the legal profession, he was, after a comparatively short course of study, admitted to the bar, and opened an office as attorney and counselor at law, and solicitor in equity, in Milledgeville, then the capital of the state, which was the sole residence of his future life. Early thereafter he married the daughter of the late lamented Judge Davis, long an ornament to the bench and bar of our chief emporium. During a long and happy wedlock, they reared numerous sons and daughters, several of whom still surviving, 'arise up and call them blessed.'

"In the counties of the Ocmulgee circuit, and sundry counties of adjoining circuits, the youthful barrister rapidly built up a large and lucrative practice, which he steadily maintained until promoted to the bench, and which, immediately upon its establishment, introduced him to the bar of this court. 'As

a commercial lawyer, he encountered among his competitors few equals, whilst he achieved enviable prominence in other branches of the profession. Long inured to studious habits, he kept pace with advancement in legal lore, and the facility with which he called up the acquirements of secluded study, admirably fitted him for circuit practice, and the reputation acquired at *sisi prius*, he sustained and enlarged in this court. A clear perception of the strong points in his case, ready application of pertinent law, severe logic, earnest advocacy, and a winning address, made him a power with both judge and jury.

"After a long and successful practice he was, in the year 1859, raised to the bench of the superior court of the Ocmulgee circuit, which position he held until promoted to that of associate justice of this honorable court by the legislature of 1865 and 1866.

"With his large intellectual endowments, legal learning, innate love of justice, and mental and moral independence, the subject of this memoir could not fail of success on the bench. That was, in his conception, an altitude far above the plane of favoritism or personal bias towards either litigant or advocate. He held, with steady, even hand, the scales of justice, discerning, with legal acumen, the preponderance of evidence and of law. If at times an ardent temperament hurried his active mind too precipitately to a conclusion, he was ever ready to retrace the processes of thought and rectify any errors of hasty judgment. To the practice and the administration of law, the energy of his life was chiefly devoted. Well knowing the proverbial jealousy of his chosen mistress, he resisted, so far as duty to the public permitted, the wily seductions of her dangerous rival, which have spoiled the prospects of so many promising American jurists, by luring them into the political arena. But in a country like ours, wherein a fickle populace is every day stigmatizing the legal fraternity as an expensive excrescence upon the body politic, as voracious feeders upon other men's troubles, yet every day making imperative demands upon them for service within and without their professional sphere, it was not to be expected that such a man as IVERSON L. HARRIS, would be permitted to employ himself exclusively with musty, black-lettered tomes, voluminous briefs, and forensic arguments. Time and again the people of his county deputed him to represent them in the legislative councils of the state. These calls were unsought, and always attended with personal sacrifice, but usually answered with unquestioning devotion to the public weal.

"As a legislator, deaf to mere popular clamor, both conservative and liberal, comprehensive in his views, yet attentive to details and unsparing of labor, he promoted as well the interest of his immediate constituents as the welfare of the commonwealth at large.

"It may be truly said that in the forum, on the bench, and in the legislature, he left the impress of large intellectual endowments, high culture, moral purity, and faithful service. In the year 1856 he was elected a trustee of the University, to the good government and steady advancement of which he zealously devoted his time and talents for nearly twenty years, when declining health and physical suffering compelled a resignation of the trust.

"Public employment beyond the confines of his native state, though always open to him, he never sought. Georgian to the heart's core, his ambition found ample scope upon the soil and in the affairs of Georgia. Happy for the grand old commonwealth, did more of her sons, equally gifted, thus limit their aspirations !

"In his personal and social relations, Judge HARRIS wore a charm that time served only to brighten and strengthen. His friendship was a priceless pearl that suffered neither decay nor dimness. To him who won and worthily cherished it, it was a boon for life. As the head and centre of a large and interesting domestic circle, it was pleasing and instructive to contemplate him, but the sacredness of that inner life stifles the temptation to further comment.

"Judge HARRIS was a rapid and independent thinker, and in matters of public or general interest, free and bold in the expression of his opinions. The frankness of his nature forbade cautious concealment. He was eminently a *true* man, not simply in the sense that precludes the utterance of falsehood, nor yet alone in the broader idea that includes fidelity to all contracts, obligations and engagements, express or implied, with others, but in that higher significance which embraces also strict conformity, in every walk of life, to well considered, settled principles. These, like Socrates and his disciples, he faithfully observed as '*philosophy, the guide of life.*'

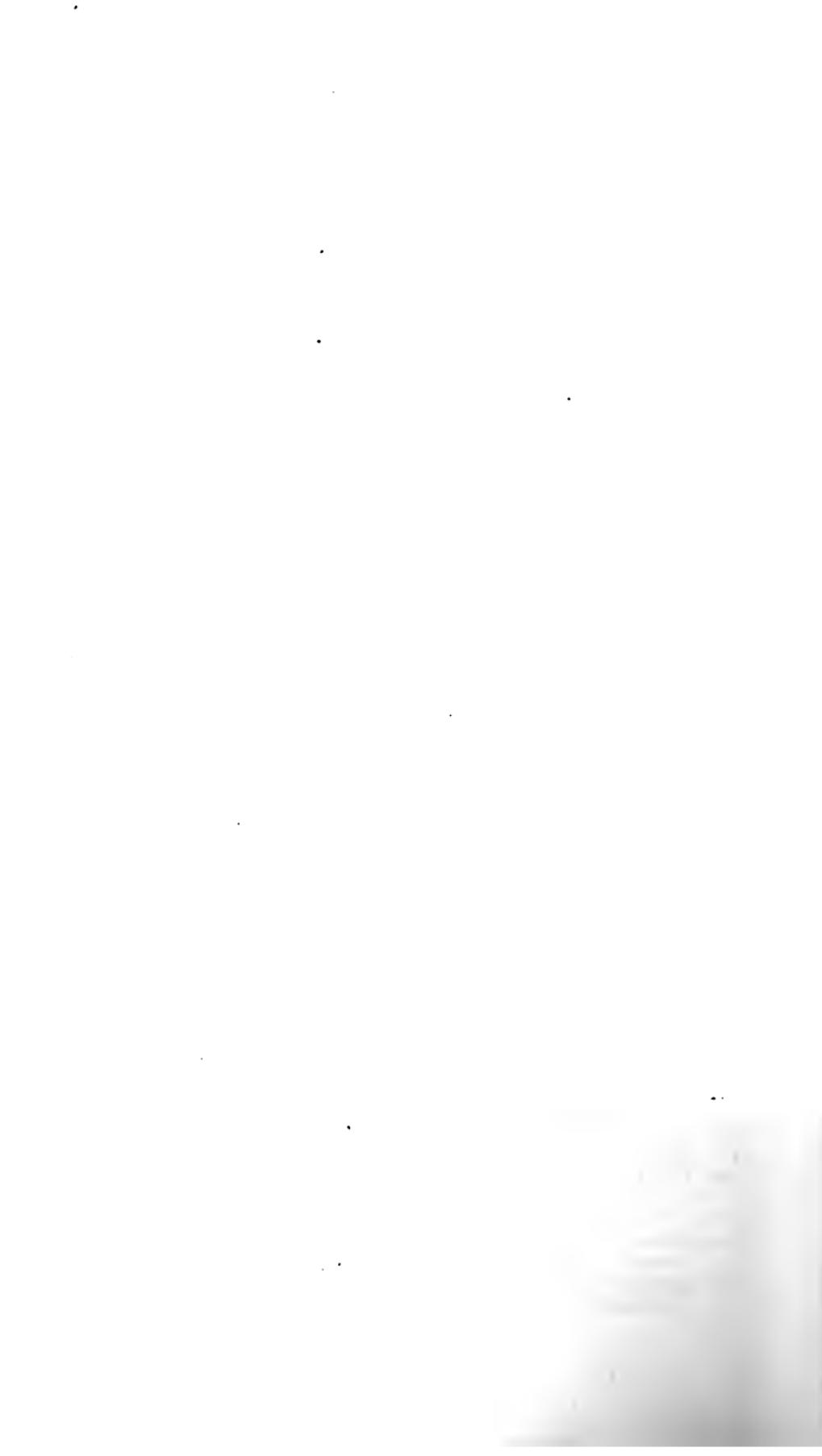
"Had his acquisitions been applied to accumulation, he would have amassed a fortune, but not so did he value money. He valued it rather for its uses in affording abundant comfort to a numerous household—in aiding useful enterprises, in maintaining a genial and liberal hospitality, and in dispensing a large and uncalculating charity.

"During the later years of his life he was afflicted with a painful malady, which, baffling the skill of the medical faculty, slowly, though steadily, wasted the vigor of a strong constitution. The suffering incident to it, as well as other trials of life, which come to all, he bore with fortitude that did honor to his manhood. He nevertheless attained a good old age, having numbered his '*three score years and ten,*' being mercifully spared the '*labor and sorrow,*' that must have attended the completion of '*four score.*'

"IVERSON L. HARRIS is no more, and his few surviving cotemporaries, especially they who from early youth, through mature manhood, even down to old age, enjoyed his friendship, covering their faces in sadness, may accept the bereavement as a reminder that '*the days of their years*' are well nigh accomplished.

(Signed)

"CHARLES J. JENKINS,
"J. A. BILLUPS,
"ROBERT P. TRIPPE,
"WM. MCKINLEY,
"SAMUEL HALL,
"THOS. G. LAWSON,
"WM. A. LOFTON."



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CERTIORARI.

- I. Where proceedings are not returned to next term of superior court, unless such court convenes within twenty days after issuing of writ, *certiorari* dismissed. *Southwestern R. R. Co. vs. Baldwin*, 150.

2. When proceedings are had which are provided for on opening of public road, only county or owner of land can complain by writ of *certiorari*. Writ issues to justice who presided at assessment, and not to county judge or to ordinary. *Sum. Mac., Gra. or P. R. Co. vs. Deutscher Scheutzen Club*, 495.
3. Where owner and persons who petitioned for road, consented to refer to county judge the legal effect of verdict for damages, it was mere private arrangement, and superior court could not, on *certiorari*, at instance of petitioners, reverse action of county judge, and order road opened without payment of any damages. *Ibid.*

CHAMPERTY. See *Contracts*, 13.

CHARGE OF COURT.

1. To charge that important witness was apparently interested, was error. *Lellyett vs. Markham*, 13.
2. Data sufficient to authorize charge, though there may be no direct evidence on the point. *Holland vs. Long & Bro.*, 36.
3. Charge, as a whole, not inapplicable, the inapplicability of some parts not avail on general objection to the whole. *Watkins vs. Paine*, 50.
4. More definite and specific charge desired, attention of court should be called thereto by request. *Ibid.*
5. Charge upon case not made by pleadings, error. *Towers vs. Baker*, 81.
6. Exception to charge, none taken, presumption follows that jury was correctly instructed. *Jordan vs. Ingram*, 92.
7. Oral comments may be added to written request, where the court is not required to give the whole charge in writing. *Moughon vs. State*, 102.
8. Request which assumes as matter of fact that which is disputed, should be refused. *Maguire vs. Baker et al.*, 109.
9. Charge which is not injurious to complaining party, no ground of new trial. *Roberts, Dunlap & Co. vs. Graybill*, 117.
10. Request to charge unauthorized by testimony, should not be given. *Piper et al. vs. Wade, adm'r*, 223; *Sheibley vs. Hill, adm'r, for use*, 222.
11. Judge may caution the jury to discriminate the evidence from all other statements before them. *City Bank of Macon vs. Kent*, 283.
12. Where counsel, demanding that the whole charge shall be in writing, presents certain written requests to charge, if the requests are given with additions or modifications, these must also be reduced to writing, if counsel so require. *Ibid.*
13. Right of court to decline to notice request which requires addition or modification. *Ibid.*
14. Error to read and refuse requests in presence of the jury, accompanying refusal with such remarks as were prejudicial to defense. *Beach & Co. vs. Branch, Sons & Co.*, 362.
15. Rule of law so general as not to be practically useful at some point where the case presses, need not be given in charge. *Mayor etc., of Griffin et al. vs. Inman, Swann & Co.*, 370.
16. The jury having nothing to do with punishment prescribed, better practice not to give law concerning it in charge. *Russell vs. State*, 420.
17. Inaccuracies in charge immaterial when verdict is fully supported by evidence. *Larey vs. Taliapferro*, 443.
18. Request properly refused, second request, substantially the same, should meet same fate. *McLendon vs. Frost*, 448.

19. Better practice not to read aloud requests to charge which court intends to refuse. *Ibid.*
20. Credible, evidence which is the most, error for court to express opinion as to. *Davant et al., ex'rs, vs. Carlton*, 489.
21. Notwithstanding overwhelming evidence of guilt, error to charge that jury should return verdict of guilty. *Tucker vs. State*, 503.
22. Objectionable to discredit prisoner's statement by comparing it with evidence and showing discrepancies. *Ibid.*
23. Statement of legal effect of written instrument, not error. *Galloway vs. West. & At. R. R. Co.*, 512.
24. Unless request is all legal and pertinent, court not bound to give any part. *Gardner, trustee, et al. vs. Grannis*, adm'r, 239.
25. General rule given as to evidence necessary to overcome responsive answer, if more minute instructions are desired, request should be made. *Dillard et al. vs. Ellington*, adm'r, 567.
26. Not error to instruct jury on trial of exceptions to master's report, to find for or against each exception. *Ibid.*

CIRCUMSTANTIAL EVIDENCE. See *Criminal Law*, 25, 43.

CLAIMS.

1. Whilst all equities between the parties may be adjudicated in claim case, and the verdict and judgment moulded, yet pleadings must be framed accordingly. *Hamberger vs. Easter, Peggy, Griffin et al.*, 71.
2. Stay-bond binds property of security from date of its execution. *Hayden vs. Anderson et al.*, 378.
3. Where claimant purchased from security after execution of stay bond, through his agents, who were co-securities with the vendor, he was affected with notice of the lien. *Ibid.*
4. The holder of the legal title must claim; therefore, the transferee of a bond for titles, all the purchase money not having been paid, cannot claim. *Ibid.*

COMPROMISE AND SETTLEMENT.

1. New note given for less sum than old, in renewal thereof, is presumptive evidence that all differences were adjusted. *Piper et al. vs. Wade*, adm'r, 223.
2. To rebut such presumption, there must be clear and satisfactory evidence that both parties agreed and intended that the settlement made when new note was given, was not final. *Ibid.*
3. If, in dealing in cotton futures, principal knows that factor has deviated from instructions by selling out too early, and nevertheless settles with him in full, by note, the irregularity is ratified, and former cannot urge such deviation as defense to note. *Wilson vs. Frisbie, Roberts & Co.*, 269.
4. That account used as basis of settlement, contained error, but which did not affect result, no ground to open. *Ibid.*
5. If one has health to understand material facts which appear on face of account, and does understand them at time, whether from examination or otherwise, state of health is sufficient for occasion. *Ibid.*
6. Where settlement was made on basis of abstract of account taken from plaintiffs' books, and not by reference to books themselves, one of the plaintiffs may testify that such abstract was correct. *McLendon vs. Wilson, Callaway & Co.*, 438.

7. Competent for such plaintiff, who conducted negotiations with defendant, to testify that drafts were given in final settlement of account, defendant having stated that he signed them with understanding that any errors should be subsequently corrected. *Ibid.*
8. Where payments have been applied and bills rendered, showing both debits and credits, debtor may be bound by acquiescence, even though he did not previously understand and assent to each account. *McLendon vs. Frost*, 448.
9. Docket entry of "settled," made by judge, and not transferred to minutes, no evidence of terms of settlement; nor can any inference be drawn therefrom, on trial of another case between other parties, that debt sued for was extinguished. *McNulty et al. vs. Marcus*, 507.

CONFEDERATE MONEY. See *Payments*, 1.

CONFESSIONS. See *Criminal Law*, 41.

CONSIDERATION. See *Contracts*, 6, 16-18, 26.

CONSTITUTIONAL LAW.

1. Seventh amendment to constitution of United States providing for jury trial, relates only to proceedings in United States courts. *Foster vs. Jackson & Clayton*, 206.
2. Imprisonment under bail process, issued in trover for personality, is not in violation of provision of constitution of 1868, which declares that there shall be no imprisonment for debt. *Harris vs. Bridges*, 407.

CONTEMPT, ATTACHMENT FOR. See *Sheriff*, 1, 2.

CONTINUANCE.

1. When on third day of trial, a motion is made for continuance, two hours and a half is not too short a time to allow for completing showing. *McLendon vs. Frost*, 448.
2. That case had taken direction not anticipated by defendant, no ground of continuance, when reasonable precaution would have prepared for such aspect. *Ibid.*

CONTRACTS.

1. Where a writing is obscure by reason of abbreviation, what it means is for the jury. To arrive at such meaning, intelligible expressions in the instrument may be compared with facts otherwise proved. *Holland vs. Long & Bro.*, 36.
2. Contract by general agent of insurance company, charged with the duty of appointing sub-agents, whereby he obligated the company to pay to sub-agent a fixed sum per month, and signed as general agent, is contract of the company. *Cotton States L. Ins. Co. vs. Mallard*, 64.
3. That the charter vests such duty in the general agent, "subject to the approval of the officers of the company," not render such approval a condition precedent to contract. *Ibid.*
4. Where contract is ambiguous, construction, under the evidence, should be left to jury. Error for court to construe in charge. *Harris et al. vs. Dub*, 77.
5. Where the term "Lanier House" was used in a contract, and it was a question of doubt whether such term covered simply the hotel or the entire building in which the hotel was located, testimony as to what such term ordinarily meant was admissible. *Ibid.*

6. Even though this corporation came within the act of 1857, and §§ 1421, 1423 of the old Code, so as to render contracts for the loan of money at a greater rate of interest than seven per cent., null and void, yet the money actually borrowed, with legal interest thereon, constituted good consideration for promise to repay, made after the repeal of the laws against usury. *Houser vs. Planters' Bank of Fort Valley*, 95.
7. Though the plea attacks the entire consideration, yet amendment will be allowed making it applicable only to the inadequacy of consideration as to the usury. *Ibid.*
8. Stipulation not to proceed against party, is an agreement not to sue. *Planters' Bank of Fort Valley vs. Houser*, 140.
9. Contract consummated on Sunday, courts not interfere. *Ellis vs. Hammond, ex'r, et al.*, 179.
10. Guaranty of solvency of notes by party who paid the same to contractor for work done, on contract to pay him in such notes, with guaranty, not promise to pay debt of another. *Mobile & G. R. R. Co. vs. Jones, assignee*, 198.
11. Right of action accrued so soon as insolvency of makers, with reasonable diligence, could have been ascertained. *Ibid.*
12. Agreement based upon no legal consideration, not binding. *Brown, trustee, vs. Warren et al., survivors*, 214.
13. Contract that D. turn over to M. one execution against C.; that if M. collects all or any part of the same, he is to pay D. one-half thereof, "M. to pay all costs, is champertous. *Meeks vs. Dewberry*, 263.
14. If one has health to understand, and does understand material facts, health sufficient to contract. *Wilson vs. Frisbie, Roberts & Co.*, 269.
15. If, after maturity of note, new party signs it as surety, and new stipulations be introduced increasing rate of interest, no time of payment being expressed, instrument is due immediately, and surety, as well as principal, is bound for whole debt. *Rogers et al. vs. Rosser*, 319.
16. Where no consideration is expressed for new elements, either party may go into parol evidence to show that there was, or was not, consideration for them. *Ibid.*
17. If it was part of consideration that creditor should give indulgence until certain law-suit was determined, he cannot maintain action during pendency of such suit. *Ibid.*
18. Note being absolute and unconditional, defendants cannot show by parol, that it was to be surrendered if suit did not result in a particular way, without pleading and proving that this stipulation was to have been inserted, but was omitted by fraud, accident or mistake. *Ibid. ; Goodman vs. Fleming*, 350.
19. Corporations, contract between, not rendered void by fact that some of persons assisting to make, were officers in both corporations, and represented both to extent of respective powers. *Mayor etc., of Griffin et al. vs. Inman, Swann & Co.*, 370.
20. To find that contract made and to be performed in foreign state, was void for usury, evidence must show that rate of interest was in excess of that allowed by law of such state. *Ibid.*
21. Where plaintiff's evidence showed that the draft sued on was given by defendant's agent to him, for money advanced with which to purchase cotton; that said agent notified defendants of the draft and the circumstances under which it was given; that defendants subsequently received the cotton thus purchased but refused to accept the draft, applying the proceeds of the cotton to a claim in their favor against their said agent: *Held*, that a non-suit should not have been awarded. *Nutting vs. Sloan, Groover & Co.*, 392.

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22. Sales wholly on authority, written or verbal, of defendant, and on his credit, he is an original debtor, and law of promise to answer for debt of another is inapplicable. *McLendon vs. Frost*, 448.
 23. Where employee of railroad agrees to assume all risk incident to employment, fact that he was running over another railroad at time of injury, not release him. *WARNER and JACKSON, J. J. Galloway vs. West. & At. R. R. Co.*, 512.
 24. Statement by court in its charge, of legal effect of written instrument, not error. *Ibid.*
 25. Maker of note bound individually, though word "administratrix" be annexed to signature. *Harrison, adm'r, vs. McLellan*, 531.
 26. Surrender of notes made by intestate, sufficient consideration to support individual note by administratrix to creditor. *Ibid.*

CORONER. See *County Matters*, 2.

CORPORATIONS.

1. Contract by general agent of insurance company, charged with duty of appointing sub-agents, whereby he obligated the company to pay a fixed sum per month, is the contract of the company. *Cotton States L. Ins. Co. vs. Mallard*, 64.
2. That the charter vests this duty in the general agent "subject to the approval of the officers of the company," does not render such approval a condition precedent to the contract. *Ibid.*
3. Sub-agent is not bound by private contract between company and general agent, but is bound by provisions of charter. *Ibid.*
4. Subscriber to shares in corporation contracts with reference to charter; the number of shares to be subscribed, or the stock necessary to do the contemplated business, constitutes important element. *Mem. B. R. R. Co. vs. Sullivan; Same vs. Omberg*, 240.
5. Release of subscriptions produces same practical result as failure to take amount prescribed by charter. *Ibid.*
6. Nominal subscription, to fulfil the letter and break the spirit of the contract, is no compliance with the charter. *Ibid.*
7. Whether amendment to charter be material or not, is question of law for the court. *Ibid.*
8. Subscriber acquiescing by payment of subscription, cannot afterwards object either to failure to obtain subscribers to the whole stock, or to a material amendment of the charter; but that he merely paid assessment to have the route surveyed, not sufficient to show such acquiescence. *Ibid.*
9. Books including stock-ledger, admissible in suit between company and stockholder. *Macon & Aug. R. R. Co. vs. Vason et al., ex'rs*, 314.
10. Settlements between company and stockholders to whom former is indebted, may be made by the directors, nothing wrong or fraudulent appearing, they being but a mere adjustment of cross-demands. *Ibid.*
11. *Ultra vires*, allowing stockholders to pay up subscriptions before due, in depreciated currency, is; but such payment is no defense in behalf of other stockholders who did not thus settle, it being a mere nullity. *Ibid.*
12. Stockholders not paying in depreciated currency might, perhaps, by bill, compel equitable adjustment, by which each would pay same amount for stock. *Ibid.*
13. Number and qualification of directors, fixed by charter, essential to be

adhered to, to make calls valid; but payments under irregular calls show acquiescence. *Ibid.*

14. Conditions precedent to validity of calls must be shown, before recovery can be had. *Ibid.*
15. Forfeiture of stock for failure to meet call, is satisfaction of debt; but mere threat, made in the call, to forfeit if not paid, will not bar the action, especially if it appear that there was no forfeiture. *Ibid.*
16. Contract between two corporations, not rendered void by fact that some of persons assisting to make, were officers in both corporations, and represented both to extent of respective powers. *Mayor etc., of Griffin et al. vs. Inman, Swann & Co.*, 370.
17. Dividends on stock correspond to hire of property. Purchaser of stock from administrator at unauthorized sale, liable for dividends, with interest thereon. *Nutting et al. vs. Thomasson et al.*, 418.
18. Dividends treated as lost, are those innocently paid by corporation, whether to purchaser himself or those holding under him. *Ibid.*
19. Payments to transferees are all innocent, unless corporation is chargeable with negligence or breach of faith, in suffering transfers to be made. *Ibid.*

See *Municipal Corporations.*

COSTS.

1. Where prisoner escapes before trial, solicitor only entitled to costs which have accrued up to time of escape. *Robinson, sol. gen., vs. Smith, ord'y*, 332.

COUNTY MATTERS.

1. Revenue of county must be collected, and courts will not favor illegality to tax *f. i. fa.* *Hawkins vs. County of Sumter*, 166.
2. Coroners can only summon physicians, at expense of county, where verdict suggests death from poison. *Farrell et al. vs. Commissioners of Floyd County*, 347.
3. No provision for assessment of damages to be paid by private persons as condition precedent to opening public road. *Sum. Mac., Graded or Plank Road Co. vs. Deutscher Scheutzen Club*, 495.
4. When proceedings are had which are provided for, only county or owner of land can complain of writ by *certiorari*. Writ issues to justice who presided at assessment, and not to county judge or ordinary. *Ibid.*
5. Where owner and persons who petitioned for road, consented to refer to county judge the legal effect of verdict for damages, it was mere private arrangement, and superior court could not, on *certiorari*, at instance of petitioners, reverse action of county judge, and order road opened without payment of any damages. *Ibid.*

COURTS. See *Criminal Law*, 38.

COVENANT. See *Landlord and Tenant*, 10-12.

CRIMINAL LAW.

1. Indictment for hog-stealing sufficiently certain, if animal be so described as to be identified by owner. *Rivers vs. State*, 28.
2. Indictment containing count for robbery and one for assault and battery, is demurrable. *Davis vs. State*, 66.
3. Error to charge that this case has already consumed too much unneces-

- sary time, that the prisoner has been allowed great latitude in introducing evidence at unseasonable times, in order that he might show, if he could, his innocence. *Ibid.*
4. Opinion of witness experienced in use of guns, as to length of time since weapon was discharged, admissible in connection with facts on which it is founded. *Moughon vs. State, 102.*
 5. That shot found on day after shooting in one barrel of gun were similar to those which lodged in person assaulted, admissible, *Ibid.*
 6. That person other than defendant admitted that he did the shooting, inadmissible. *Ibid.*
 7. Sufficient if facts connecting defendant with offense, be proved beyond reasonable doubt, whether by positive or other testimony. *Ibid.*
 8. Direct and circumstantial evidence are the same in effect when they equally convince the mind, and either kind of evidence is sufficient to establish a fact or to warrant a conclusion. *Ibid.*
 9. Circumstantial evidence need not further be defined than by reading to the jury section 3747 of Code. *Ibid.*
 10. Unfriendly interview with defendant, proper matter of evidence; his manner during interview, and that it was unusual, proven as part of *res gestæ*. *Ibid.*
 11. Arrested on suspicion, that prosecutor had defendant, inadmissible. *Ibid.*
 12. To direct the jury to weigh the evidence with caution and deliberation, and not to infer guilt unless established beyond a reasonable doubt, is not the equivalent of a direction to determine whether the circumstances in evidence were sufficient to satisfy the jury beyond a reasonable doubt that the defendant committed the crime, not whether it is more probable that he committed it than any other person. *Ibid.*
 13. Grand juror cannot impeach his finding. *Turner vs. State, 107.*
 14. Whilst charges constituting ingredients of crime must be proven to satisfaction of jury, yet the evidence may be circumstantial as well as direct. *Ibid.*
 15. Demand for trial not cause for discharge, unless at term when made and at next succeeding term, there were juries impaneled etc. *Roe-buck vs. State, 154.*
 16. Indictment for simple larceny in stealing two hogs at same time and place, alleging them to be the property of different persons, covers but one transaction and charges but one offense. *Lowe vs. State, 171.*
 17. Proof that defendant stole one of the hogs sufficient to convict. *Ibid.*
 18. The evidence in this case would have authorized a verdict for murder, and as it was only for voluntary manslaughter, the discretion of the court refusing a new trial will not be controlled. *Stiles vs. State, 183.*
 19. Threats made four or five days before homicide, admissible to show malice. *Ibid.*
 20. Defendant cannot object to what transpired the same night, at an adjoining village, when he first introduced it. *Ibid.*
 21. Where difficulty commenced at one place and terminated at another, on the same night and in the same village, all that transpired at both places is admissible as part of *res gestæ*. *Ibid.*
 22. In charging on reasonable doubts, not error to tell jury that they should reconcile all the testimony if possible, and if not, to believe those whom they thought most entitled to credit. *Ibid.*
 23. In personal encounter resulting in death, where defendant set up self-defense, sections 4331 and 4333 of the Code should be construed together. *Ibid.*

24. That one of the traverse jurors had not been a resident of the county for as much as six months before trial, no ground of new trial. *Meeks vs. State*, 329.
25. Where there is direct evidence of a homicide by shooting, and direct evidence that the prisoner was present and admitted that he shot deceased, case is not founded solely on circumstantial testimony. *Ibid.*
26. In charging on grades of homicide, not error to omit provisions of Code prescribing punishment for various grades of manslaughter. *Ibid.*
27. Even in capital case, verdict left to stand though some competent evidence was excluded, if it be perfectly clear that the conviction would be no less rightful with the excluded evidence in than with it out. *Beck vs. State*, 351.
28. Indictment for larceny after trust, under sections 4422 and 4224 of the Code, need not charge that the conversion was without the consent of owner or bailor, etc. *Alderman vs. State*, 367.
29. The description of the animal converted, as a black male hog, the property of B., was sufficient, and proof that the hog was marked does not contradict such description. *Ibid.*
30. Where the question was whether a conversion took place in Bulloch county, and one witness, who was not present at the conversion, testified to several circumstances, adding "was in Bulloch county," and the witness who saw the conversion, does not locate it in any particular county, venue is not sufficiently proved. *Ibid.*
31. Lewd house, on indictment for keeping, evidence of general reputation for chastity of women, admissible. *McCain vs. State*, 390.
32. Lewdness carried on privately in house will make defendant guilty. *Ibid.*
33. Lewd house, defendant found guilty of keeping; fine of \$300.00 and costs, or twelve months on public works, not excessive. *Ibid.*
34. Indictment for malpractice alleged that possessory warrant was tried before defendant, a justice of the peace of Chatham county, possession awarded to plaintiff, and an execution issued against the defendant for costs; that, when plaintiff demanded possession, the justice refused to deliver, had an entry of *nulla bona* made on *f. fa.*, and a levy made on property in dispute, though plaintiff offered to point out property belonging to defendant: Held, that motion in arrest was properly overruled. *Russell vs. State*, 420.
35. No error in requiring defendant to produce docket and such official papers as were relevant to the issue. *Ibid.*
36. Error to rule that solicitor had right to argue that defendant's unwillingness to produce official papers was a confession that they would criminate him. *Ibid.*
37. The jury having nothing to do with the punishment provided, the law in reference thereto should not be given in charge. *Ibid.*
38. A true bill found by grand jury, drawn at a term to which the superior court was adjourned by order of the judge issued at chambers, to serve at the next regular term, should be quashed on plea in abatement filed. *Finnegan vs. State*, 427.
39. Order to *nol. pros.* first bill passed before second was found, but not drawn and entered of record until afterwards; plea setting up facts and claiming discharge, properly stricken. *Williams vs. State*, 478.
40. Homicide of child by father, in chastising him, when murder and when manslaughter. *Ibid.*
41. No error in charge that if body of child showed wounds like those

which would be produced by the instrument defendant confessed he had used, then this would be sufficient corroboration of confession to justify conviction. *Ibid.*

42. Nor in charging that jury should look to testimony and see what kind of wounds were inflicted, and whether they could have resulted from natural causes, and whether there were any persons besides defendant who could have inflicted them. *Ibid.*
43. Evidence being purely circumstantial, slight in its nature, and not inconsistent with innocence of defendant, new trial should have been granted. *Shannon vs. State*, 482.
44. Larceny established, fact that stolen goods were immediately thereafter found in possession of defendant, presumptive evidence of guilt. *Tucker vs. State*, 503.
45. Notwithstanding overwhelming evidence of guilt, error to charge that jury *should* return verdict of guilty. *Ibid.*
46. Objectionable in court to discredit prisoner's statement by comparing it with evidence and showing discrepancies. *Ibid.*
47. That name of one of grand jury who found bill was not in box, neither good in arrest nor as ground for new trial. *Mills vs. State*, 609.
48. This case is controlled by *Jordan alias Steger vs. State*, 56 Georgia, 92. *Buller et al. vs. State*, 610.

DAMAGES.

1. Where purchaser of land fails to comply with contract, measure of damages is difference between the price agreed upon, and depreciated value at time contract was broken and notice thereof given to seller. Speculative profits etc., which might have been made, should not be considered. *Gilbert vs. Cherry*, 128.
2. Appeal must not only be frivolous, but intended for delay only, to authorize judgment for twenty per cent. damages. *Gunnels vs. Deavours*, 177.
3. To recover triple damages for injury to animals, under section 1445 of Code, plaintiff must sue for such, and must further allege that defendant's enclosure was not legally protected. *Lee vs. Nelms*, 253.
4. Widow suing for homicide of husband, subsequent marriage not affect measure of damages. *Georgia R. R. and B'k'g Co. vs. Garr*, 277.
5. Where record fails to show any judgment in court below, damages not awarded by supreme court for bringing case up for delay. *Dosier et al. vs. Williams*, 600.

DECEIT. See *Sales*, 6.

DECREE. See *Equity*, 2, 9; *Judgments*, 3.

DEEDS.

1. Though descriptive language differs from that used in affidavit to dispossess tenant, yet deed is admissible if property be identified by *ali unde* testimony. *Thompson vs. Chapman*, 16.
2. Land described by metes and bounds, evidence is admissible to show that plat in controversy was not included. *Maguire vs. Baker et al.*, 109.
3. Ancient document, deed dated on 20th July, 1821, though improperly probated and recorded, which comes from proper custody, admissible as, even though there be no proof of delivery. *Thursby vs. Myers*, 155.
4. Record of intermediate deed will not cure failure to record original

- deed in time, so as to affect title in another from same grantee of state, acquired before record of such intermediate deed. *Ibid.*
5. Possession of part of land covered by deed will embrace whole tract described therein, whether it be one lot or a number of lots. *Parker ex'x, vs. Jones et al., 204.*
 6. If vendor conveys before he has title, and subsequently acquires title, it enures immediately to benefit of vendor. *Ibid.; Thursby vs. Myers, 155.*
 7. Witness who read original record before it was destroyed, may testify that defective probate was upon record, notwithstanding an official copy, made from record before destruction, sets forth deed as recorded without any probate annexed. *Gardner, trust., et al. vs. Granniss, adm'r, 539.*
 8. Ancient document, deed more than thirty years old at time of trial is, though it was under thirty when suit was commenced. *Ibid.*
 9. Preliminary proof necessary as to custody, possession under, etc. *Ibid.*
 10. Any circumstance which would place man of ordinary prudence on guard, and induce serious inquiry, sufficient to constitute notice of prior unrecorded deed. *Ibid.*
 11. Absolute deed, made in January, 1874, by a widower to two of his creditors, to secure indebtedness, they giving bond to reconvey on payment of notes, passed legal title. *Broach vs. Barfield et al., 601; McAlpin et al. vs. Lee, 281.*
 12. Such title was not divested by subsequent voluntary bankruptcy of grantor, and his consequent discharge from all his debts. *Ibid.*
 13. Nor by his causing land to be set apart in bankruptcy as homestead exemption. *Ibid.*
 14. Nor by grantees filing in bankrupt court objections to allowance of such exemption, and an adverse adjudication thereon. *Ibid.*
 15. To redeem land thus held, debt must be paid or tendered; and, generally, a tender will be effective though delayed until after creditor has recovered possession. *Ibid.*

DELIVERY. See *Sales*, 1, 9.

DEMAND FOR TRIAL. See *Criminal Law*, 15.

DEVISE. See *Wills*, 2, 4, 6, 8.

DISCOVERY. See *Equity*, 14-16.

DISTRESS WARRANT. See *Landlord and Tenant*, 7, 9, 10.

EJECTMENT.

1. Where, to ejectment by vendor against vendee who has made default in payment, a third person is made a party defendant, deed offered by her showing title out of plaintiff, and to explain her possession, admissible. *McAlpin et al. vs. Lee, 281.*
2. That plaintiff proved claim for purchase money in bankrupt court, as against estate of vendee, not prevent recovery. *Ibid.; Broach vs. Barfield et al., 601.*
3. Action on legal title, plaintiff cannot prove and recover on equitable. *Sutton vs. Aiken, trustee, 456.*
4. After sole defendant has died, and other defendant has been brought in, and has pleaded to merits, action may proceed as to latter, with-

- out making representatives of former parties. *Gardner, trustee, et al. vs. Granniss, adm'r, 539.*
5. Verdict on issue of forgery, tried under section 2712 of Code, no evidence against defendant subsequently made party at instance of plaintiff; more especially if such new party be proceeded against also for mesne profits. *Ibid.*
 6. Affidavit used in connection with issue of forgery, by original defendant, cannot, because so used, be read to jury to affect defendant not then a party. *Ibid.*
 7. Deed essential to plaintiff's title a forgery, verdict should be for defendant. *Ibid.*
 8. Where person claiming to be owner was brought in as defendant to action originally instituted against his overseer, prescription is measured by length of possession prior to suit, without adding time which elapsed before landlord was made a party. *Ibid.*
 9. Defendant not liable for mesne profits taken, prior to his own entry, by those under whom he claims; but if, in accounting for profits chargeable to himself, he claims credit for improvements made by predecessors, such improvements must first answer for profits taken by those who erected them. *Ibid.*
 10. Where statute of limitations as to mesne profits is not pleaded, account taken for whole period during which defendant has been in perception of profits as against plaintiff's title. *Ibid.*
 11. Mesne profits not denied solely because defendant, by clearing and improving premises, has made same more valuable. *Ibid.*
 12. Special pleas to ejection which present no sufficient defense, ought to be stricken. *Broach vs. Barfield et al., 601.*

ELECTIONS. See *Municipal Corporations, 5, 6.*

EQUITY.

1. Sale under foreclosure of saw-mill lien, after bill filed by true owner to enjoin, with agreement that proceeds should stand in place of mill and be distributed according to the equities of the respective parties, true owner takes fund. *Walker vs. Butt et al., 20.*
2. The verdict sufficiently covered the issues made by the pleadings to authorize a decree thereon. *Tift, adm'r, vs. Hartwell, ex'r, 47.*
3. Bill filed July 28th, 1873, alleged that complainant held a mortgage executed by Walker in 1859 and due in 1860; that in November, 1869, rule nisi to foreclose was sued out, but no service was had; that at November term, 1870, the time for service was extended and defendant required to show cause at next term; that service of this order was perfected in February, 1871; that defendant had sold the property in 1870, complainant having no notice thereof. Prayer that the mortgage be foreclosed and the deed canceled, or that the purchase money be applied to the mortgage: Held, that a demurrer should have been sustained for want of equity, and because claim was barred. *Coleman, trustee, vs. Worrill et al., 124.*
4. Contract for sale of land drawn by attorney of seller, and, by fraud or mistake, did not express real agreement, reformation will be decreed. *Gilbert vs. Cherry, 128.*
5. Bill by wife of defendant to enjoin ejection, which alleges that plaintiff, her brother, had purchased land for her, he to hold title until repaid, that he had been repaid, etc., contains equity. *Scott vs. Taylor et al., 168.*

6. Younger grantee, sued at law by holder of older grant, went into equity on ground of valuable improvements, praying compensation; jury found that he had been repaid by income, decree denying further compensation proper. *Epping vs. Tunstall et al.*, 267.
7. Will equity compel older judgment creditor, when there are junior mortgages upon distinct parcels of the debtor's property, to resort to that last encumbered, or compel all to contribute *pro rata?* *Williams, Birnie & Co. vs. Brown, sheriff, et al.*, 304.
8. Stockholders, some paid up in depreciated currency; though this act was *ultra vires* and void, yet others, when sued for subscription, might, perhaps, maintain bill to compel equitable adjustment. *Macon & Aug. R. R. Co. vs. Vason, et al., ex'rs*, 314.
9. Where verdict finds for complainants specific sum of money, decree by chancellor, simply adopting and approving verdict, not illegal. *Hayden vs. Anderson et al.*, 378.
10. Demurrer to bill, auditor or master has no power to decide. *White vs. Reviere, adm'r*, 386.
11. Whilst chancellor may direct jury to find special verdict, and may direct their attention to particular points by written questions, yet such questions should present main issue clearly and fully, so that verdict shall unmistakably speak the exact amount due. *Lake, trustee, vs. Hardee et al.*, 459.
12. If amounts be not set out so certainly, both as to principal and interest, that decree may follow verdict, new trial necessary. *Ibid.*
13. Where complainants base their right against defendant as trustee, on their being heirs-at-law of their grandfather, they cannot recover, without amendment, as legatees under his will, against defendant as executor. *Ibid.*
14. Where bill for account alleges that accounting involves investigation and settlement of several connected matters, and prays for discovery as to all of them; and where complainants, after obtaining discovery, amend bill, striking therefrom one of the matters, as to which the discovery made is favorable to defendant, defendant is still entitled to use his answer as evidence, as far as it is responsive. *Dillard et al. vs. Ellington, adm'r*, 567.
15. Matter stricken is not put out of case as to any purpose of defense which it would have subserved had it not been stricken. *Ibid.*
16. Where complainants have gone behind discharge to executor, and have obtained discovery as to actual state of his accounts, executor may insist upon having such actual state considered in measuring relief to which complainants are entitled in respect to another branch of case, so far as accounts are correct and pertinent. *Ibid.*
17. If discharge would have barred either party, each has waived the bar as to this litigation. *Ibid.*
18. General rule as to what is necessary to overcome responsive answer charged, more minute instructions, if desired, should be requested. *Ibid.*

ESTOPPEL.

1. Notice to sue principal, given by indorser, is not notice to sue indorser, and does not estop latter from setting up defense that suit was prematurely brought as against him. *Planters' Bank of Fort Valley vs. Houser*, 140.
2. Written representation may be contradicted by parol, except where it operates by way of estoppel. After being acted on, it will so operate upon some issues, but may not upon others. *Drake vs. Bush*, 180.

3. Doctrine of estoppel by admission discussed. *Dalton City Co. vs. Johnson*, 398.
4. Widow, who is sole distributee of husband's estate, all of which is subject to be set apart for year's support, but before so set apart and before administration, delivers personalty to creditor of husband in payment of debt, she is not thereby estopped, after she becomes administratrix, from maintaining trover or complaint therefor. *Gouldsmith vs. Coleman*, adm'x, 425.
5. Where employee of railroad receives and retains money from company, on faith of statement by him that he did not mean to sue for damages, he is estopped from so suing. *Galloway vs. West. & At. R. R. Co.*, 512.
6. That administrator inventoried and returned certain property as part of estate of intestate, will not affect his right to assert that it was left in his hands as security for any sum that might be found due on final settlement. *Dillard et al. vs. Ellington*, adm'r, 567.

EVIDENCE.

1. Though descriptive language of deed differs from that used in affidavit to dispossess tenant, nevertheless admissible if property be identified by *aliunde* testimony. *Thompson vs. Chapman*, 16.
2. Where a writing is obscure by reason of abbreviation, what it means is for the jury. To arrive at such meaning, intelligible expressions in the instrument may be compared with facts otherwise proved. *Holland vs. Long & Bro.*, 36.
3. Press letter book is not original evidence. *Watkins vs. Paine*, 50.
4. Letters which might have been put in evidence but were not, not considered on motion for new trial. *Ibid.*
5. Terms "Lanier House" used in contract; question as to whether they referred simply to the hotel or to the entire building in which such hotel was situated; testimony as to the sense in which such terms were ordinarily used was admissible. *Harris et al. vs. Dub*, 77.
6. Statements of husband in presence of wife and not denied by her, may operate as admission, the jury being cautioned as to restraint etc. *Sindall vs. Jones, Drumwright & Co.*, 85.
7. Opinion of witness experienced in use of guns, as to the length of time since weapon was discharged, admissible when accompanied by facts on which it is founded. *Moughon vs. State*, 102.
8. Direct and circumstantial evidence are the same in effect when they equally convince the mind; and either kind of evidence is sufficient to establish a fact or to warrant a conclusion. *Ibid.*
9. Deed describes land by metes and bounds, evidence admissible to show that tract in controversy was not included. *Maguire vs. Baker et al.*, 109.
10. Action for damages for breach of agreement to pay for lands all the oats that could be raised thereon in given year, plaintiff not permitted to testify that if purchaser had complied with contract he (plaintiff) would have received \$25,000 00, whilst he could not now sell for \$15,000 00. He should have stated facts and left conclusion to jury. *Gilbert vs. Cherry*, 128.
11. Plaintiff should not be permitted to testify that he could have cleared \$600 00 in cutting and hauling wood, if he had not been prevented by said contract. *Ibid.*
12. Where irrelevant evidence is admitted without objection, opposing party should be allowed to contradict it or it should be withdrawn from jury. *Ibid.*

13. Contract unusual and ambiguous in terms and stipulations, parol evidence as to surrounding circumstances etc., in respect to intention of parties, should be received. *Ibid.*
14. Book of account was properly excluded; the precise foundation which was laid for its introduction, does not appear. *Petit vs. Teal*, 145.
15. Deed dated on July 20th, 1821, apparently genuine, coming from proper custody, but defectively probated and recorded, admissible as ancient document. *Thursby vs. Myers*, 155.
16. Exemplified copy of will from ordinary's office is presumptive proof that it was properly probated. *Ibid.*
17. Whether testator was the vendee in the deed which originated his title if he had any, should be left to jury and constitutes no objection to will. *Ibid.*
18. Will admissible though no letters testamentary be put in evidence, the ordinary certifying that such letters had been issued. *Ibid.*
19. Written representation may be contradicted by parol, except where it operates by way of estoppel. *Drake vs. Bush*, 181.
20. Establishment of lost papers, copy or transcript in office of clerk of supreme court, is sufficient evidence of contents. *Eagle and Phenix Man. Co. vs. Bradford, trust.*, 249.
21. Admission by servant of past wrongful act, not binding on master. *Lee vs. Nelms*, 253.
22. Telegram expressed in cipher may be translated into ordinary language by witness who understands it. *Wilson vs. Frisbie, Roberts & Co.*, 269.
23. Instrument attested by subscribing witness, inadmissible except upon proof of execution by such witness, unless absence is satisfactorily accounted for. *McAlpin et al. vs. Lee*, 281.
24. Testimony upon a given question may be satisfactory, though not wholly unimpeached. *City Bank of Macon vs. Kent*, 283.
25. In action upon contract, indictments still pending, found after suit was brought, are not relevant, though person indicted be the principal witness for defendant, and though the offense charged be forgery and larceny by the witness in respect to the money constituting the consideration of the debt sued for. *Ibid.*
26. When the judge can find no obscurity in the date of an instrument, he may say so, and read the date aloud in the hearing of the jury, the instrument being in evidence. *Ibid.*
27. Where, on money rule, older *f. s. f.* was attacked upon ground that property sufficient to satisfy had been released, exemplification of bill filed by present holders to enjoin levy, against former holders, upon which consent order had been taken providing for transfer to present holders and the release of certain property therefrom, was admissible, as it tended to show the circumstances under which transfer was made, and the inducement which led to the release. *Williams, Birnie & Co. vs. Brown, sh'ff, et al.*, 304.
28. No consideration expressed on face of contract, existence or non-existence may be shown by parol. *Rodgers et al. vs. Rosser*, 319.
29. Note being absolute and unconditional, defendants cannot show by parol, that it was to be surrendered if certain suit did not result in particular way, without pleading and proving that this stipulation was to have been inserted, but was omitted by fraud, accident or mistake. *Ibid.*
30. That suit was brought in court of record for given cause of action and afterwards dismissed, not proved by parol, where no excuse is shown

- for not producing better evidence. *Collins & Son et al. vs. Bullard*, 333.
31. On trial of justice of peace for malpractice, no error to require defendant to produce docket and such official papers as were relevant. *Russell vs. State*, 420.
 32. Parol evidence inadmissible to prove contents of such papers until production of original had been sought in manner prescribed by law, or their loss or destruction shown. *Ibid.*
 33. Where settlement was made on basis of abstract of account taken from plaintiffs' books, and not by reference to books themselves, no error in allowing one of plaintiffs to testify that such abstract was correct. *McLendon vs. Wilson, Callaway & Co.*, 438.
 34. Such plaintiff, who conducted negotiations with defendant, may testify that drafts were given in final settlement, defendant having stated that he signed them with understanding that any errors in account should be subsequently corrected. *Ibid.*
 35. Where drafts were given by defendant upon plaintiffs, and acceptance was therein waived, parol testimony admissible to show circumstances attending making of same, and reasons for such waiver. *Ibid.*
 36. Evidence that defendant stated his intention not to pay the drafts shortly after making them, and in absence of plaintiffs, properly rejected. *Ibid.*
 37. Where accounts are in evidence, and they are pertinent otherwise than as mere memoranda used by the witnesses to refresh their memory, not error to refuse to rule them out except as such memoranda. *McLendon vs. Frost*, 448.
 38. Court should not remark that evidence had been admitted *ex gratia*, rather than by the strict rules of law. *Ibid.*
 39. When there is positive evidence of fact, admission of cumulative evidence, not strictly legal, no ground of new trial. *Ibid.*
 40. That no goods were sold without authority, written or verbal, from party, is pertinent, when items are numerous, some supported by written orders and others not. *Ibid.*
 41. Defendant's sworn plea may, in argument, be commented on as sworn statement, and may be compared with his testimony to disparage it. *Ibid.*
 42. Sworn plea is an admission, and when testimony of defendant conflicts with it, circumstance may be remarked on to jury as affecting credit. *Ibid.*
 43. That debt was just and payments rightfully applied to it, may appear without showing particular items. *Ibid.*
 44. Where insurance policy provided that no receipt for premiums, after first, should be valid without seal of company, receipt from agent, without seal, was inadmissible; but payment could be proved *aliunde*. *Am. L. Ins. Co. vs. Green et al.*, 469.
 45. Where tenant in common, having possession of joint property, makes entry in book indicating that he no longer holds for co-tenant, such entry is admissible in his favor, on plea of statute of limitations, if notice be brought home to co-tenant. *Harral vs. Wright et al., ex'rs*, 484.
 46. Notice of entry in books of dissolved copartnership, of which both tenants were formerly members, not notice of like entry in some other book. *Ibid.*
 47. Docket entry of "settled," made by judge, and not transferred to minutes, no evidence of terms of settlement; nor can inference be drawn

- therefrom, on trial of another case, between other parties, that debt sued for was extinguished. *McNulty et al. vs. Marcus*, 507.
48. Issue whether conveyance made by father to son shortly before death, for alleged consideration of \$500.00, and natural love and affection, was advancement, gift, or sale, it was competent to show that the father returned land and paid taxes thereon, for year in which conveyance was made, and prior thereto. *Tuggle vs. Tuggle*, adm'r, 520.
 49. Competent to show what was value of father's estate at time of conveyance. *Ibid.*
 50. Verdict on issue of forgery, tried under section 2712 of Code, no evidence against defendant subsequently made party to ejectment at instance of plaintiff. *Gardner, trustee, et al., vs. Granniss*, adm'r, 539.
 51. Affidavit which was used in connection with such issue, by original defendant, cannot, because so used, be read to affect defendant not then a party. *Ibid.*
 52. Witness who read original record, before destroyed, may testify that defective probate was of record, notwithstanding official copy, made from record before destruction, sets forth deed as recorded without any probate annexed. *Ibid.*
 53. Issue whether deed purporting to have been made by testator was forgery, will, subsequently executed, in which no disposition is made of property covered by deed, admissible to show non-claim. *Ibid.*
 54. Deed more than thirty years old at time of trial, is ancient document, though it was under thirty when suit was commenced. *Ibid.*
 55. Preliminary proof as to custody, possession thereunder etc. *Ibid.*
 56. On trial of exceptions to master's report, report is before jury as evidence as well as pleading. *Dillard et al. vs. Ellington*, adm'r, 567.

EXECUTIONS.

1. Failure of clerk to indorse date and amount of judgment, not prevent collection of principal and interest. *Manry et al. vs. Shepperd*, 68.
2. That declaration did not describe defendants as being of county in which suit was brought, no objection to execution issuing from superior court. *Ibid.*
3. Judgment against William Manry is misdescribed in *f. fa.* which states that judgment was rendered against William Manry, junior, when the two names apply to different persons, both of whom reside in the county. *Ibid.*
4. Judgment must be followed by execution; if it is not, *f. fa.* is amendable, but pending levy falls. *Ibid.*; *Williams, ex'r, et al., vs. Atwood et al., ex'rs.*, 190.
5. Trover against administrator for property converted since death of intestate; verdict and judgment against defendant; the execution, following the declaration by addition of the word "administrator," is not inconsistent with judgment, the latter word being simply *descriptio persona*. *Bagley vs. Robinson*, 148.
6. Release of property subject to *f. fa.*, satisfaction *pro tanto* so far as purchasers and creditors are concerned. *Williams, Birnie & Co. vs. Brown, sheriff, et al.* 304.
7. Where, on money rule, oldest *f. fa.* was attacked because of release of property, exemplification of bill filed by present holders to enjoin levy, against former holders, upon which consent order had been taken providing for transfer to present holders, and the release of certain property therefrom, was admissible *Ibid.*

8. Younger *s. fa.*, by garnishment, brings fund into court, which is consumed by older after deducting expense of younger; amount of expense should be credited on older. *Bullard, ex'r, vs. Leaptrot et al.*, 522.

EXECUTORS. See *Administrators and Executors.*

FACTORS.

1. If, in dealing "in cotton futures," principal knows that factor has deviated from instructions by selling out too early, and nevertheless settles with him in full, by note, the irregularity is ratified, and former cannot urge such deviation as defense to note. *Wilson vs. Frisbie, Roberts & Co.*, 269.
2. That account used as basis of settlement, contained error, but which did not affect result, no ground to open. *Ibid.*
3. If one has health to understand material facts which appear upon face of account, and does understand them at time, whether from examination or otherwise, state of health is sufficient for occasion. *Ibid.*
4. Where duplicate bill of lading for cotton, placed by consignor in hands of banker for safe-keeping, was indorsed by the latter to the factor or consignee, without the knowledge or consent of consignor, and factor paid banker's drafts to amount exceeding value of cotton, believing it to be property of banker, consignor's title was neither lost nor impaired. *Tison & Gordon vs. Howard*, 410.

FORMER RECOVERY. See *Pleadings*, 4.

FRAUDS—STATUTE OF. See *Contracts*, 10, 22.

FRAUDULENT CONVEYANCE.

1. Transactions between husband and wife, to the prejudice of his creditors, are to be scanned closely. *Booher vs. Worrill*, 235.
2. Conveyance by husband to wife, made but a few days before judgment against him, *prima facie* fraudulent. *Ibid.*
3. Where the consideration is a debt from him to her, actual existence thereof must be shown; this is not done by proving that she owned realty, and that at the time of executing conveyance there was an accounting for rents, she claiming and he admitting that the rents had been collected by him and not paid over. *Ibid.*
4. If debtor, recently after conveying to claimant absolutely, is in possession, and so continues until levy is made, possession presumed to have existed at date of conveyance, and is a badge of fraud. *Collins vs. Taggart*, 355.

GRANT.

1. After draw but before grant issues, equitable title is in drawer, and legal title in state for use of drawer on payment of grant fee; on sale of such equitable title, state holds for use of vendee. When grant issues to drawer, vendee becomes, by statute of uses, clothed with complete legal title; subsequent deed by drawer conveys no title. *Thursby vs. Myers*, 155; *Parker, ex'x, vs. Jones et al.*, 204.

GUARANTY. See *Contracts*, 10, 11.

GUARDIAN AND WARD.

1. Where administrator, who was also guardian of intestate's children, charged himself, as guardian, with having received from himself, as

administrator, a certain sum in cash, he cannot plead and prove, in defense to action on bond as guardian, that the amount so charged as cash, was, in fact, made up of notes on divers persons who had since become insolvent, etc. *Cranford, adm'r, et al., vs. Brewster, ord'y, for use, 226.*

2. Note dated and due on March 7th, 1861, payable to the guardian individually, was properly excluded, it not being made to appear that it represented a part of the ward's estate, except by the loose statement of the guardian in his return, made in April, 1869, "that it was for the funds belonging to his wards." *Ibid.*
3. Without stipulation in contract, or some averment in pleadings, no presumption that note to guardian, made in 1863 and due in 1864, was, of right, payable in Confederate money. *Bonner, guard'n, vs. Nelson, 433.*
4. If complainants had no guardian before the year 1865, right of action did not accrue prior to that year, and limitation act of 1869 would not bar. *Lake, trustee, vs. Hardee et al., 459.*

HOMESTEAD.

1. Partners apply severally for homesteads in partnership land, which are set apart. Exemptions valid against creditor of firm. *Harris et al., adm'rs, vs. Visscher et al., 229.*
2. In suits brought for *torts* committed on wife, latter may be joined with husband notwithstanding section 2960 of Code. *East Tenn., Va. & Ga. R. R. Co. vs. Cox et ux., 252.*
3. Mortgage in 1870 without waiver of homestead; on application for homestead in 1871, objections filed by mortgagee were withdrawn on condition that homestead be set apart subject to mortgage: *Held, that on the death of the mortgagor's wife, shortly thereafter, he having no minor children, the specific homestead right touching which the agreement was made, terminated for all time. Benedict, Hall & Co. vs. Webb, 348.*
4. Right to homestead upon second marriage, unaffected by such agreement. *Ibid.*
5. Absolute conveyance as security for debt, title not divested by bankruptcy of grantor, and setting apart of homestead in the land, in the bankrupt court. *Broach vs. Barfield et al., 601.*

HUSBAND AND WIFE.

1. Statements by husband in presence of wife and not denied by her, may operate as admissions, the jury being properly cautioned as to restraint etc. *Sindall vs. Jones, Drumwright & Co., 85.*
2. Sale of wife's separate estate to creditor of husband in satisfaction of debt, is void. The fact that the nominal purchaser is not the creditor, but is acting as his agent to secure the debt, not alter result. *Kent & Co. et. al. vs. Plumb, trustee, et al., 207.*
3. Transactions between husband and wife, to the prejudice of his creditors, are to be scanned closely. *Booher vs. Worrill, 235.*
4. Conveyance by husband to wife, made but a few days before judgment against him, *prima facie* fraudulent. *Ibid.*
5. Where the consideration set up is a debt from him to her, actual existence thereof must be shown; this is not done by proving that she owned realty, and that at the time of executing conveyance there was an accounting for rents, she claiming and he admitting that the rents had been collected by him and not paid over. *Ibid.*

6. Action by husband for *tort* committed to wife, latter may be joined. *East Tenn., Virginia and Georgia R. R. Co. vs. Cox et ux.*, 252.
7. Right to sue for homicide of husband, not divested by subsequent marriage of widow. *Georgia R. R. and Bank'g Co. vs. Garr*, 277.
8. Nor will such marriage change measure of damages. *Ibid.*
9. Right to reduce to possession distributive share of wife in estate of father, who died before act of 1866, was vested right in husband, and if he reduced same to possession after such act, as his own estate, it became subject to his debts; but if reduced to possession as his wife's estate, and, in consideration of having used it as her property, he conveyed to her a tract of land in lieu thereof, then such property is not subject to his debts. *Sperry & Niles vs. Haslam*, 412.
10. As the record discloses that the judgment was obtained against the husband three years before date of his deed to wife, and that therefore she took subject to such lien, the verdict finding the property not subject, must be set aside. *Ibid.*
11. If deed by husband to wife, executed in 1852, vested any separate estate, the same, on her death, descended to him as her sole heir, unless she died after law of inheritance was changed by act of 1871-2. *Ibid.*

ILLEGALITY.

1. After affirmance in the supreme court, plaintiff not obliged to enter up judgment against surety on *supersedeas* bond, before taking out execution against defendants in original judgment. *Manry et al. vs. Shepard*, 68.
2. Failure of clerk to indorse on execution date and amount of judgment, not prevent collection of principal and interest. *Ibid.*
3. To execution from superior court, no objection that declaration failed to describe defendants as of the county in which suit was brought. *Ibid.*
4. Excessive levy, illegality is not the remedy against. *Ibid.*
5. Judgment against William Manry is misdescribed in execution which states that judgment was rendered against William Manry, junior, when the two names apply to different persons, both of whom reside in the county. *Ibid.*
6. Though this defect is amendable, the pending levy must fall. *Ibid.*
7. Set-off by note or account cannot be set up by illegality to tax *fr. fa.* *Hawkins vs. County of Sumter*, 166.
8. Sale of railroad under judgment and execution at law, arrested by illegality. *City of Atlanta vs. Grant, Alexander & Co. et al.*, 340.
9. Illegality cannot go behind by judgment. *Lynch vs. Gannon*, 608.

IMPROVEMENTS. See *Ejectment*, 9, 11.

INDICTMENT. See *Criminal Law*, 1, 2, 28, 29, 34, 38.

INDORSEMENT.

1. Indorsement under separate contract, in writing, that payee is not to proceed against indorser until property of principal, covered by mortgage to payee, is exhausted, prevents suit on indorsement until compliance with such agreement. *Planters' Bank of Fort Valley vs. Houser*, 140.
2. Notice to sue principal, given by indorser, is not notice to sue indorser, and does not estop latter from setting up defense that suit was prematurely brought against him. *Ibid.*

3. Indorsee of promissory note, without words of negotiability, may maintain suit in his own name. *Goodman vs. Fleming*, 350.
4. Bill of lading, proper person to pass by indorsement is consignee, not consignor. *Tison & Gordon vs. Howard*, 410.

INSURANCE.

1. The by-laws of masonic insurance company provided that proof of death should be submitted in a certain manner, that this proof should be laid before directors at next monthly meeting, and upon their decision each member should be assessed \$1.00. M. disappeared in November, 1869, but no formal proof of death was ever made. In June, 1871, directors resolved that they were satisfied of death and made assessment: *Held*, that the assessment only covered such as were members at the date of the resolution. *Miller vs. Geo. Mas. M. L. Ins. Co.*, 221.
2. Acceptance of premium overdue, by general agent of company, waiver of forfeiture for that time, insured being in good health at date of payment. *Am. L. Ins. Co. vs. Green et al.*, 469.
3. Where policy provided that no receipt for premium, after first, should be valid without seal of company, receipt from agent, without seal, inadmissible; but payment could be proved *aliunde*. *Ibid.*
4. Self-destruction by person insane at time, without fault on his part, not suicide. *Life Association of America vs. Waller*, 533.

INTERROGATORIES.

1. Court ordered that commission be re-executed, the original answers remaining of file. The entire package was returned for re-execution, and both sets of answers were offered together at subsequent term: *Held*, that objection made thereto after case was submitted to jury, was properly overruled. *Central R. R. & B'k'g Co. vs. Rogers' Sons*, 336.
2. Commissioner entrusted to find another commissioner and execute interrogatories, may recover whatever his services are reasonably worth, though he was appointed as commissioner for other party before thus entrusted. *People's Bank of Newnan vs. McLendon*, 384.

INJUNCTION.

1. Estate indebted to legatee, execution against him, in favor of executors, enjoined. *Dobbs vs. Prothro et al.*, 14.
2. Where tenant in common has mortgaged entire estate, equity may enjoin sale under foreclosure until after partition, especially where mortgagor is insolvent. *Hines et al. vs. Munnerlyn et al.*, 32.
3. Claim against co-tenant for profits arising from exclusive use, will form part of decree for partition and account, and will take precedence of mortgage made by him. *Ibid.*
4. Plea withdrawn on agreement that plaintiff would do the equity set up therein; on failure, equity will relieve against the judgment by injunction. *Markham et al. vs. Angier et al.*, 43.
5. Where agent who was appointed to operate certain iron works to secure the debts of certain creditors holding liens thereon, contracted with complainants for supplies, etc., which enabled him to make iron, and sold to them iron in payment therefor (though perhaps it was contemplated there should subsequently be payment in money), and after a part of the iron was delivered, such agent and secured creditors conspired together to prevent complainants from obtaining possession of balance, and the works had suspended and the agent was

- insolvent ; bill alleging these facts and praying injunction and receiver, should not be dismissed on demurrer. *Smith, Sons & Bro. vs. McElwain et al.*, 247.
6. This case distinguished from *Cubbedge & Hazlehurst vs. Adams*. *Ibid.*
 7. If injunction against sale of railroad under judgment and execution at law, not properly moulded, would issue at all, necessary condition would be, that executive officer of corporation had been requested to interpose illegality, and had refused to do so; or that such request had been omitted for some sufficient reason. *City of Atlanta vs. Grant, Alexander & Co. et al.*, 340.
 8. Naked trespass, injunction not issue against. *Paramore vs. Persons et al.*, 473.
 9. Complainant alleged that S., now deceased, and himself, were the only solvent sureties on bond of W., as administrator of D.; that said administrator had committed a *devastavit*, for which complainant was threatened with suit; that B. had administered on the estate of S.; that latter's heirs-at-law, many of them non-residents, had recovered a judgment against B. for *devastavit* on estate of S.; that this judgment constituted all the assets left of said estate, and complainant would have to make good W's *devastavit* alone, unless these remaining assets could be saved so as to make S's estate contribute; that B's lands would be sacrificed if sold at this time. Prayed that sheriff and heirs of S. might be enjoined from selling lands of B.: *Held*, that the discretion of the chancellor, refusing to restrain the sheriff from selling the lands and collecting the amount of the judgment, will not be controlled. *Poullain, Sr., vs. English, sheriff, et al.*, 492.
 10. Remedy against sale complete by claim, injunction is needless. *Bailey, next friend, vs. Simpson, sheriff, et al.*, 523.
 11. Irremediable injury set up, state of facts likely to occasion such injury must be averred. *Ibid.*
 12. Injunction in bankruptcy, contemplated by decisions of this court in *52 Georgia Reports*, 371, and *55 Ibid.*, 547, is not alone perpetual injunction granted on final decree. *Seligman et al., trust., vs. Fersi & Co. et al.*, 501.
 13. Under circumstances of this case, fund in hands of receiver of state court, less expenses, ordered turned over to trustees in bankruptcy. *Ibid.*
 14. Where administrators and sureties are insolvent, and distributive shares of heirs whose land is levied on to satisfy debt to estate, are largely in excess of such debt, and plea of heirs to action at law was withdrawn on condition that judgment would simply stand in lieu of notes etc., discretion of chancellor granting injunction, not controlled. *Coffee, adm'r, vs. Griffin et al.*, 606.
 15. Discretion of chancellor exercised in granting or refusing injunction, not controlled unless manifestly abused. *East Rome Town Co. vs. Nagle et al.*; *Crutchfield vs. Coleman*; *Phipps et al. vs. Cook & Son et al.*; *Mayor etc., of Americus vs. Barlow*, 607.

JUDGMENTS.

1. Default, whether judgment by shall be set aside, addressed to sound discretion of court below. *Lambert vs. Smith*, 25.
2. Plea withdrawn under agreement that plaintiff would do the equity set up therein; on failure, equity will relieve against the judgment. *Markham et al. vs. Angier et al.*, 43.
3. Decree upon bill for direction, which does not fix the amount due by

- the executor, but directs him to make certain payments, to retain certain sums, and to report his doings thereon from term to term, not such a final decree for money as to constitute lien on property from date of rendition. *Hamberger vs. Easter, Peggy, Griffin et al.*, 71.
4. Prescribed form of judgment is merely directory. *Lester vs. Brown & Carmichael*, 79.
 5. Judgment against administrators which does not provide for collection out of property of intestate is simply irregular and is amendable. *Pryor et al., adm'rs, et al., vs. Leonard*, 136.
 6. That judgment is partially paid off constitutes no reason for not allowing amendment. *Ibid.*
 7. On motion to amend, administrators not heard to say that they had no notice of debt, they having been served with declaration and process. *Ibid.*
 8. Judgment on note which specifies object for which money was borrowed, no adjudication upon any right of lender growing out of that part of instrument. *Drake vs. Bush*, 180.
 9. Junior judgment for money, based on conversion of trust property, is not entitled to priority over older judgments in distribution of fund brought in under garnishment. *Mendleson vs. Pardue, trustee*, 202.
 10. On appeal from judgment at common law, rendered in 1860, court has no power to enter up judgment against defendant and security on appeal, in 1874, without intervention of a jury, though no defense be filed on oath. *Walker et al. vs. Bivins et al.*, 322; *Birdsong vs. Woodward, for use*, 354.
 11. Railroad, to authorize sale of under judgment, latter, together with execution, must be specially moulded in substantial compliance with sections 3082, 3562, 3639 of Code. *City of Atlanta vs. Grant, Alexander & Co. et al.*, 340.
 12. Amendable, judgement for sale of railroad is, by adding appropriate directions for sale, and for issuing special execution. *Ibid.*
 13. Not office of rule absolute foreclosing mortgage, to show on its face what credits were allowed in fixing amount of debt; and motion by mortgagor, made a year after rule was granted, to amend for sole purpose of declaring that a certain credit, not pleaded, was allowed, should be overruled. *Cherry vs. Home B. & L. Association*, 361.
 14. Confession by attorney of record conclusive until authority is traversed and found wanting by jury. *Davant et al., ex'rs, vs. Carlton*, 489.
 15. Action upon administration bond, proper judgment is *de bonis propriis*; and such is the character of the judgment in question, though it describes defendant as administrator. *McNulty et al. vs. Marcus*, 507.
 16. Though it does not appear that plaintiff had obtained prior judgment *de bonis testatoris*, before suing upon bond, judgment thereon, against administrator alone, not void. *Ibid.*
 17. Action on contract submitted to jury without any issuable defense on oath, in presence of defendant and counsel, and amount of verdict, after introduction of testimony, agreed on, verdict rendered in pursuance thereof is not a nullity, but will support judgment entered in usual form. *Ibid.*
 18. Where complainants have gone behind judgment of discharge to executor, and have obtained discovery as to actual state of accounts, judgment is no longer a bar to either. *Dillard et al. vs. Ellington, adm'r*, 567.

19. Absolute conveyance as security for debt and subsequent bankruptcy of grantor; that grantees objected to homestead being set apart by bankrupt court in land, and adverse adjudication thereon, not divest title. *Broach vs. Barfield et al.*, 601.
20. Equity will enjoin judgment in favor of insolvent administrator against heir, which was obtained with understanding that it was simply to take place of notes, where distributive share largely exceeds amount of judgment. *Coffee, adm'r, vs. Griffin et al.*, 606; *Dobbs vs. Prothro et al.*, 14.
21. Defense arising before judgment must be pleaded before judgment. *Lynch vs. Gannon*, 608.
22. Revived judgment has lien from revival only; and so long as judgment of revival is unreversed, fact that original judgment was dormant, whether true or false, is *res adjudicata*. *Foster, adm'r, vs. Reid*, 609.

See *Levy and Sale*.

JURISDICTION.

1. Bill for direction by executor, must be filed in the county of the residence of some defendant against whom substantial relief is prayed. *Shewmake, adm'r, et al., vs. Johnson et al., ex'rs*, 75.
2. Foreign executor liable to account in courts of this state, when. *Lake, trustee, vs. Hardee et al.*, 459.
3. After service, appearance, and pleading to merits, too late for defendant to object to jurisdiction of court over person. *Gardner, trustee, et al., vs. Granniss, adm'r*, 539.

JURY.

1. Grand juror cannot impeach his own finding; his testimony that there was no bill or presentment before the jury when the witnesses were sworn, or that the proper oath was not administered to the witnesses, will not be considered. *Turner vs. State*, 107.
2. In civil case, when evidence is conflicting as to fact set up by defendant, and jury are consequently in doubt, they are not obliged, as matter of law, to give benefit of doubt to defendant. *City Bank of Macon vs. Kent*, 283.
3. Judge may caution jury to discriminate evidence from all other statements before them. *Ibid.*
4. Dispersal after making verdict, by consent and with leave of court, not proper to poll when verdict is subsequently returned and read. *Ibid.*
5. Impeach verdict, jurors cannot. *Ibid.*
6. That one of traverse jurors had not been a resident of county for as much as six months before trial, not ground of new trial. *Meeks vs. State*, 329.
7. Bill found by grand jury at term to which superior court had been adjourned by order, passed at chambers, should be quashed. *Finneghan vs. State*, 427.
8. Two witnesses to transaction and evidence irreconcilable, jury must determine which is entitled to most credit, and return verdict accordingly. *Killorin et al. vs. Bacon*, 497.
9. That name of one of grand jury who found bill was not in box, no ground for arrest of judgment or for new trial. *Mills vs. State*, 609.

LANDLORD AND TENANT.

1. Affidavit to dispossess, description of premises need not be by metes and bounds. *Thompson vs. Chapman*, 16.
2. Deed admissible though descriptive language be different, where property is identified by other evidence as the same. *Ibid.*
3. Tenancy or no tenancy the issue; unnecessary to prove title from state. *Ibid.*
4. If tenant, on being informed that purchase from his landlord is dependent upon his agreeing to yield possession at end of his term, consents to do so, and the purchaser acts upon such consent, and the tenant repeats the promise both to vendor and vendee, it is an attornment, and is equivalent to express promise to hold under vendee for residue of term. *Ibid.*
5. Except in cases of special liens on crops made on land rented, landlord may distrain without previous demand and refusal, and without allegation thereof in affidavit. *Hill vs. Reeves*, 31.
6. That landlord sent for keys some time in August, and never tendered them back, presumptive of possession and dominion in August, and rent should cease from that date, though plaintiff swore that he only took possession to paint counters. *Harris et al. vs. Dub*, 77.
7. Distress warrant may issue for rent payable in specifics before same becomes due. *Rosenstein vs. Forrester et al.*, 94.
8. Title to crop raised on rented land is not in landlord so as to empower him to recover in trover, or, waiving *tort*, in assumpsit. He has lien to be enforced by distress warrant. *Worrill vs. Barnes*, 404.
9. Special lien which covers crop from maturity, is only for rent of land which produces it; all other liens for rent attach only from levy of distress warrant. *Ibid.*
10. Covenant by lessee to place premises in serviceable condition and repair, to keep them so during term, and, at expiration, to return in like condition and repair, imposes obligation to rebuild, if stipulations cannot be otherwise performed. *Meyers, trustee, vs. Myrrell*, 516.
11. Covenant to make any repairs required by municipal authorities, for safety and convenience of vessels lying at demised wharf, is not broken by failure to make repairs ordered to prevent injury to river. *Ibid.*
12. When lease points out repairs which lessee is to make, as above indicated, no additional duty is cast on lessee by stipulation in same deed, that in no event is lessor to be liable for any repairs or improvements on premises; nor by further stipulation therein, that all improvements put by lessee upon premises, during term, shall become property of lessor. *Ibid.*

LAWS. See *Municipal Corporations*, 4.

LEASE. See *Landlord and Tenant*, 10-12.

LEGACY. See *Wills*, 2, 4, 6-8.

LEVY AND SALE.

1. Rule *nisi* to set aside judgment, no protection to sheriff who failed to levy, no *supersedeas* having been obtained. *Wheeler, sheriff, vs. Harrison*, 24.

2. Sale under judgment junior to unforeclosed mortgage, conveys only equity of redemption, and divests lien of judgment older than mortgage only as to that interest. *Tarver et al. vs. Ellison*, 54.
3. If proceeds be not sufficient to pay off older judgment, *si. fa.* may be levied on residue of estate in land, which will thus be sold free from mortgage. *Ibid.*
4. Execution against principal and surety, plaintiff may proceed against property of either at option. *Manry et al. vs. Shepperd*, 68.
5. Exception to this rule established by sections 1819, 2508, 3387 of Code, as to judgments on bonds of administrators, executors, or guardians, not apply to judgments on bonds of other trustees. *Ibid.*
6. Amendment of execution necessitates fall of pending levy. *Ibid.*
7. Excessive levy, illegality no remedy for. *Ibid.*
8. Purchaser of land, without notice of judgment against vendor, protected by four years' possession, though it be levied on after purchase, the levy remaining inactive. *Douglass & Douglass vs. Eblin*, 152.
9. Execution commanded officer to levy upon goods, etc., of N., administrator of G., deceased, indorser; estate of deceased not subject to sale thereunder. *Freeman vs. Binswanger*, 159.
10. Execution presumed to follow judgment. *Ibid.*
11. Where the trust is executory, with remainder over, the fact that trustee allows the life beneficiary of the income to take possession, with the understanding that he was to receive the rents, etc., in discharge of his legacy, not subject the *corpus* to be sold for his life, under execution against him. Usufruct only subject, if at all, in equity. *Thomas & Co. vs. Crawford, trustee*, 211.
12. Where personal property was exposed to sale, in lots, under *si. fa.* from United States court, levies made thereon immediately after each lot was bid off, by the sheriff, under execution from a state court against a third person, were invalid; this invalidity was not cured by the agreement of the plaintiffs in the *si. fa.* from the United States court, that they would become the purchasers of all the property and consider it all levied on. *Brown, trustee, vs. Warren et al., survivors*, 214.
13. Purchaser of homestead property at constable's sale, to maintain title, must show that there was no other property which could have been levied on, and that affidavit was made, before levy, that debt upon which *si. fa.* was founded/was one from which property set apart was not exempt. *Gillespie vs. Chastain*, 218.
14. Release of property is satisfaction *pro tanto* of execution, so far as creditors and purchasers are concerned. *Williams, Birnie & Co. vs. Brown, sheriff, et al.*, 304.
15. Will equity compel older judgment creditor, when there are junior mortgages upon distinct parcels of the debtor's property, to resort to that last incumbered, or compel all to contribute *pro rata?* *Ibid.*
16. A chartered railroad, with all the rights and privileges that appertain to it as an instrument of transportation (excluding, of course, the franchise of the corporation to be a body politic), is property subject to sale, in this state, under a judgment at law. *City of Atlanta vs. Grant, Alexander & Co. et al.*, 340.
17. But the judgment, and the execution thereon, must be specially moulded, in substantial compliance with sections 3082, 3562, and 3639 of Code. *Ibid.*

18. A sale under an execution not thus moulded, may be arrested by illegality interposed by the corporation. *Ibid.*
19. Stay-bond binds property of security from date of its execution. *Hayden vs. Anderson et al.*, 378.
20. Title originating in parol purchase, payment of money and delivery of possession, long prior to judgment against vendor, possession being adverse and continuous, will prevent sheriff from ejecting claimant, by reason of sale, though deed taken by latter bears date after judgment. *Paramore vs. Persons et al.*, 473.
21. Marshal of United States has only powers of sheriff in matter of perfecting sale of land by giving possession to purchaser. *Ibid.*

LIENS.

1. Saw-mill lien must be prosecuted within one year after debt becomes due. *Walker vs. Burt et al.*, 20.
2. Renewed, first proceeding dismissed, cannot be, unless within twelve months after debt matures. *Ibid.*
3. Section 2932 of Code applies only to ordinary suits, and not to extraordinary summary remedies. *Ibid.*
4. Saw-mill lien made by person in possession, not good against true owner. *Ibid.*
5. Sale under agreement that proceeds should stand in place of mill, after bill filed by true owner to enjoin foreclosure, latter takes fund. *Ibid.*
6. Except in cases of special liens on crops made on land rented, landlord may distrain without previous demand and refusal, and without allegation thereof in affidavit. *Hill vs. Reeves*, 31.
7. Laborer's lien, negotiable note of laborer, bought up by employer after contract of hiring, no defense to. *Fuller vs. Kitchens*, 265.
8. Attorneys' fees, act of 1866, authorizing liens for advances in provisions, etc., not extend to. *Collins & Son et al. vs. Bullard*, 333.
9. Stay-bond binds property of security from date of its execution. *Hayden vs. Anderson et al.*, 378.
10. Vendor's lien, administrator who sold and conveyed prior to adoption of Code, entitled to. *White vs. Reviere, adm'r*, 386.
11. Special lien of landlord on crop must be enforced by distress warrant. *Worrill vs. Barnes*, 404.
12. Such special lien which covers crop from maturity, is only for rent of land which produces it; all other liens for rent attach only from date of levy by distress warrant. *Ibid.*
13. Revived judgment has lien only from date of revival. *Foster, adm'r, vs. Reid*, 609.

LIMITATIONS—STATUTE OF.

1. Renewal of suits, section 2932 of the Code applies only to ordinary actions and not to extraordinary remedies. *Walker vs. Burt et al.*, 20.
2. Judgment rendered in inferior court; minutes failed to disclose that jury had been impaneled at that term; ten years thereafter, subsequent to the abolishment of such court, plaintiff prayed that the judgment be declared void and the case reinstated on the docket of the superior court: Held, that the lapse of time, unexplained, constituted equitable bar. *Harrison et al., ex'rs, vs. Rutherford*, 60.

3. Foreclosure of mortgage made in 1859 and due in 1860, commenced in November, 1869, but no service until 1871, barred by act of 1869. *Coleman, trustee, vs. Worrill et al., 124.*
4. Purchaser of land, without notice of judgment against vendor, protected by four years' possession, though it be levied on after his purchase, the levy remaining inactive. *Douglass & Douglass vs. Eblin, 152.*
5. Guaranty of solvency of notes by party who paid same to contractor for work done, on contract to pay him in such notes, with guaranty; suit must be brought within four year after right of action accrued. Action accrued so soon as insolvency of makers, with reasonable diligence, was ascertainable. *Mob. & Girard R. R. Co. vs. Jones, assignee, 198.*
6. Action by purchaser of cotton against seller, to recover for defective quality, must be brought within four years of discovery of defect. *Beach & Co. vs. Branch, Sons & Co., 362.*
7. If plaintiff was not the purchaser, but simply an agent to whom consignment was made, to be sold on commission, and if after it was sold, and the account between him and defendants settled by draft, he was compelled to refund to purchaser on account of false packing, he can recover therefor, but reclamation must be made according to the custom of the business, within such reasonable time as would enable defendants to reclaim from parties from whom they purchased. What would be such time, jury should decide. *Ibid.*
8. Where, to action on drafts, previous payments of usury were pleaded as set-off, not error to charge that such set-off should be allowed if pleaded within four years from date of last payment. *McLendon vs. Wilson, Callaway & Co., 438.*
9. Minors who had no guardian appointed prior to 1865, not affected by limitation act of 1869. *Lake, trustee, vs. Hardee et al., 459.*
10. If foreign executor filed bill against complainants, in state of appointment, for settlement, etc., which was pending until after 1865, right of action in this state did not accrue until after 1865, whether complainants were or were not age. *Ibid.*
11. If neither of above statements be true, and right of action did accrue before 1865, then complainants still are not barred, if this executor acted fraudulently and corruptly. *Ibid.*
12. Whether he so acted is question for jury, and those words in act of 1869, mean more than mere illegal conduct; they mean moral turpitude and intentional fraud. *Ibid.*
13. If tenant in common, after tortiously repudiating co-tenant, resumes the relation before bar has intervened, and then repudiates him again, latter breach will be cause of action. *Harral vs. Wright et al., ex'rs, 484.*
14. Like rule prevails between bailor and bailee. *Ibid.*
15. Cause of action considered as having accrued when defendant finally ceased to hold consistently with, or in subordination to, plaintiff's title, and latter because aware of it. *Ibid.*
16. Prescription inapplicable to assumpsit. *Ibid.*
17. Where tenant in possession makes entry in book indicating that he no longer holds for co-tenant, such entry admissible in his favor, if notice be brought home to co-tenant. *Ibid.*
18. Though notes of intestate, surrendered to administratrix, were due prior to June 1st, 1865, yet, as note given in lieu thereof was dated and due in 1867, act of 1869 does not apply. *Harrison, adm'r, vs. McClelland, 531.*

19. If legatee dies before executor's claim for over-payments is barred by statute of limitations, statute not run against him while he was administrator upon legatee's estate. *Dillard et al. vs. Ellington, adm'r*, 567.

LOST PAPERS. See *Pleadings*, 6-9.

MARSHAL OF UNITED STATES. See *Levy and Sale*, 21.

MASTER AND SERVANT. See *Principal and Agent*, 4, 5.

MASTER IN CHANCERY. See *Auditor*.

MESNE PROFITS. See *Ejectment*, 9-11.

MILL-DAM. See *Torts*, 3.

MORTGAGE.

1. Sale under judgment junior to unforeclosed mortgage, conveys only equity of redemption, and divests lien of judgment older than mortgage only as to that interest. *Tarver et al. vs. Ellison*, 54.
2. If proceeds be not sufficient to pay off older judgment, *f. fa.* may be levied upon residue of estate in land, which will thus be sold free from mortgage. *Ibid.*
3. *Bona fide* purchaser for value from mortgagor, with seven years' possession, takes free from incumbrance of mortgage not recorded in time, he having neither actual nor constructive notice of same. *Parker, ex'x, vs. Jones et al.*, 204.
4. An instrument, after reciting that makers were indebted to F. in an amount named, for which note had been given, conveyed to him certain personality, specifying that it was intended that the title should pass; it provided further, that if the note was not paid when due, F. should take possession of said property, and after advertising, sell it, and apply proceeds to debt; that if note was met at maturity, he should reconvey by quit-claim deed: *Held*, that instrument was a mortgage. *Frost vs. Allen et al.*, 326.
5. Not the office of rule absolute to show expressly on its face what credits were allowed in fixing amount of debt; and motion by mortgagee, made a year after rule was granted, to amend it for sole purpose of declaring that a credit, not pleaded, was, in fact, allowed, should be overruled. *Cherry vs. Home Build'g and Loan Association*, 361.
6. Absolute deed, made in January, 1874, by widower to two of his creditors, to secure indebtedness, they giving bond to reconvey on payment of notes, passed legal title. *Broach vs. Barfield et al.*, 601.

MUNICIPAL CORPORATIONS.

1. Erection of extensive iron bridge in lieu of wooden one, over wide railroad cut, is such an important improvement as to justify disuse of street at point to be bridged, for a reasonable time, in the discretion of the municipal authorities. *Tuggle, ex'r, vs. Mayor etc., of Atlanta*, 114.
2. Adjacent property-holder whose rents were thereby diminished, has no cause of action against city. *Ibid.*
3. Municipal corporation must be allowed to collect its revenues, and execution for such purposes cannot be stopped by illegality. *Hawkins vs. County of Sumter*, 166.
4. Amendment to municipal charter, passed in 1859, authorizing subscription to stock of railroads under certain restrictions, not repealed by par. iv., section 6th, art. III., of constitution of 1868. *Mayor etc., of Griffin et al. vs. Inman, Swann & Co.*, 370.
5. Where amendment provides that subscription shall be made on recom-

- mendment of majority of citizens, either in public meeting or by public election, proper mode of taking sense of citizens, in 1871, was to order public election by all the qualified voters. *Ibid.*
6. Votes of majority voting, though majority of the whole number of qualified voters did not vote, were sufficient to authorize subscription. *Ibid.*
 7. Authority to subscribe for stock, borrow money, and impose future taxes, embraces implied power to employ the usual and appropriate securities. *Ibid.*
 8. Competent to deliver bonds at par, in payment of subscription, in lieu of raising money on them by loan. *Ibid.*
 9. Determination by mayor and council that certain conditions preliminary to right of railroad company to receive bonds, had been complied with, binding in controversy between tax-payers and holders of bonds. *Ibid.*
 10. Contract between two corporations, not rendered void by fact that some of persons assisting to make, were officers in both corporations and represented both to extent of respective powers. *Ibid.*

NEGOTIABLE SECURITIES.

1. Note given for money specified object for which borrowed; judgment thereon is no adjudication upon any right of the lender growing out of that part of the instrument. *Drake vs. Bush*, 180.
2. New note given for less sum than old one, in renewal thereof, presumptive evidence that all differences were adjusted. *Piper et al. vs. Wade, adm'r*, 223.
3. *Bona fide* holder of negotiable bonds, payable to bearer and not due, deposited as collateral security for loan, protected in title even against true owner. *Bealle vs. So. B'k of Georgia*; *Same vs. Citizens' Mu. Loan Co.*, 274.
4. If, after maturity of note, new party signs as surety, and new stipulation be introduced increasing rate of interest, no time of payment being expressed, instrument is payable immediately, and surety, as well as principal, is bound for whole debt. *Rodgers et al. vs. Rosser*, 319.
5. Note, when altered, being in hands of *bona fide* holder, evidence to show failure of original consideration was properly excluded. *Ibid.*
6. Indorsee of promissory note, without words of negotiability, may maintain suit in his own name. *Goodman vs. Fleming*, 350.
7. Plea which sets up agreements not contained in note, and in contradiction thereof, properly stricken. *Ibid.*
8. *Bona fide* holder of negotiable securities protected. *Mayo etc. of Griffin et al. vs. Inman, Swann & Co.*, 370.
9. Where plaintiff's evidence showed that draft sued on was given by defendants' agent to him for money advanced with which to purchase cotton; that said agent notified defendants of the draft and the circumstances under which it was given; that defendants subsequently received the cotton thus purchased, but refused to accept the draft, applying the proceeds to a claim in their favor against the said agent: Held, that a non-suit should not have been awarded. *Nutting vs. Sloan, Groover & Co.*, 392.
10. Where note sued upon contains no negotiable words, and is neither indorsed nor assigned by the payee, and the payee is not a party before the court, the title is involved as a part of complainants' case, whether defendant has defense or not. *Dalton City Co. vs. Johnson*, 398.
11. Section 2789 of Code treats of notes in hands of apparently regular

- holders, and does not signify that stranger to contract may enforce it in his own name by reason of mere possession. *Ibid.*
12. Where complainant seeks to collect note not negotiable, and which has been paid by the maker to the payee, and where the right to collect, notwithstanding such payment, is claimed to arise out of a special contract, the effect of which is to estop the maker from setting up payment as against complainant, such special contract must be alleged and proved. *Ibid.*
 13. Bills of lading are symbolic of the property they represent, and though transferable so as to pass title in transaction intended to have that effect, are not, in the full commercial sense, negotiable paper. *Tison & Gordon vs. Howard*, 450.
 14. Consignee proper person to pass bill of lading by indorsement, not consignor. *Ibid.*
 15. Where duplicate bill of lading for cotton, placed by consignor in hands of banker for safe-keeping, was indorsed by latter to the factor or consignee, without the knowledge or consent of consignor, and factor paid banker's drafts to amount exceeding value of cotton, believing it to be the property of banker, consignor's title was neither lost nor impaired. *Ibid.*
 16. Maker of note bound individually, though word "administratrix" be attached to signature. *Harrison, adm'r, vs. McClelland*, 531.

NEW TRIAL.

1. The verdict is supported by the testimony. *Holland vs. Long & Bro.*, 36; *Mayo vs. Walden*, 42; *Cotton States Life Ins. Co. vs. Mallard*, 64; *Sindall vs. Jones, Drumwright & Co.*, 85; *Turner vs. State*, 107; *Maguire vs. Baker et al.*, 109; *Jossey, Jr., vs. Stapleton*, 144; *McDade vs. Hawkins et al.*, 151; *Thursby vs. Myers*, 155; *Sav., G. & N. A. R. R. Co. vs. George & Hartnett*, 164; *Ordinary of Floyd Co. vs. Smith et al.*, 210; *Mem. B. R. R. Co. vs. Sullivan*; *Same vs. Omberg*, 240; *Geo. R. R. & B'kg Co. vs. Garr*, 277; *Beck vs. State*, 351; *Meyers, trustee, vs. Myrrell*, 516; *Wilkinson vs. Smith*; *Mills vs. State*, 609.
2. Successor to judge who presided may authenticate grounds taken before himself. *Watkins vs. Paine*, 50.
3. Letters which might have been introduced but were not, not considered on motion for new trial. *Ibid.*
4. Facts known to party at trial but he made no allusion to them in his testimony, and when he might, with diligence, have discovered another witness to same facts, the subsequent discovery of such witness is no ground for new trial. *Ibid.*
5. Immaterial error no ground of new trial. *Harris et al. vs. Dub*, 77; *Roberts, Dunlap & Co. vs. Graybill*, 117; *Thursby vs. Myers*, 155; *Brown, trustee, vs. Warren et al.*, survivors, 214; *Piper et al. vs. Wade, adm'r*, 223; *Bonher vs. Worrill*, 235; *Larey vs. Taliaferro*, 443; *McLendon vs. Frost*, 448; *Wilson, sh'ff, vs. Paulsen & Co.*, 596.
6. Discretion granting or refusing new trial not controlled unless grossly abused. *Jordan vs. Ingram*, 92; *Roberson & Co. vs. Pope*, 565; *Irvine vs. Corbin*, 594; *Elsas vs. Moore*; *Walker et al. vs. Miller, adm'r, et al.*; *Noble Brothers & Co. vs. Loud*; *Geo. R. R. & B'kg Co. vs. Zachry*; *Ufford vs. State*; *Hampton vs. State*, 605.
7. Case turning solely on credibility of plaintiff or of one of defendants, and jury believe former, and his version sustains legality and equity of verdict, discretion refusing new trial not controlled. *Roberts, Dunlap & Co. vs. Graybill*, 117.

8. Newly discovered evidence which pertains entirely to agreement of counsel, not in writing, and which original counsel of defendants neglected to communicate to successors, and which they neglected to ascertain when he went on the bench, no ground of new trial. *Ibid.*
9. General countenance of case may authorize new trial, though no one feature be especially defective. *Lewis vs. Armstrong, administrator, et al.*, 127.
10. Discretion in grant of first new trial very ample. *Ibid.*; *Hart vs. Granville, Whittlesey & Co.*, 559; *Smith & Co. vs. Ehlen*, 610.
11. As general rule, new trial not granted on ground that witness states, after trial, that he was mistaken as to facts testified to by him. *Jossey, Jr., vs. Stapleton*, 144.
12. Request to charge set out as ground of motion for new trial, must be verified by judge. *McDade vs. Hawkins et al.*, 151; *Meeks vs. State*, 329.
13. Newly discovered evidence which might have been produced by exercise of ordinary diligence, no ground for new trial. *Sav., G. & N. A. R. R. Co. vs. George & Hartnett*, 164; *Wilkinson vs. Smith*, 609.
14. Where jury had not awarded to defendant full amount of interest, error to award new trial conditioned on failure of complainant to pay such additional sum. Defendant was entitled to new trial generally. *Scott vs. Taylor et al.*, 168.
15. Consent order taken allowing given time within which motion for new trial and brief of evidence may be perfected, and neither presented to judge within the specified time, he has no jurisdiction thereafter to entertain motion. *Middlebrooks, adm'r, et al., vs. Middlebrooks, guardian*, 193.
16. Grounds of motion must be certified to be true or they will not be considered by supreme court. *Kent & Co. et al. vs. Plumb, trustee, et al.*, 207.
17. Mistake of witness is immaterial where its correction would make no difference in result. *Booher vs. Worrill*, 235.
18. If it be error to refuse to hear motion read at term when rule nisi is granted, that error, unless excepted to *pendente lite*, cannot be examined on writ of error to refusal of new trial at subsequent term. *City Bank of Macon vs. Kent*, 283.
19. Better practice for judge, when motion is presented, to settle truth of recitals, but he is not legally bound to do so. *Ibid.*
20. On argument of motion, although judge may know and announce that some of the recitals are incorrect, he is not legally bound to point out errors, but may adjudicate upon motion as he finds it, noting errors in his final order, or in his certificate to bill of exceptions. *Ibid.*
21. Irregular, in disposing of motion, to examine bailiff on oath or otherwise, out of the presence of the parties or their counsel, with any view to aiding the judicial mind on a question of fact embraced in the motion. *Ibid.*
22. Interest found being slightly too much, new trial is ordered. *Rodgers et al. vs. Rosser*, 319.
23. Newly-discovered evidence, motion based on; affidavits for and against new facts, and for and against credibility of witnesses, heard. *Meeks vs. State*, 329.
24. Newly-discovered evidence which is merely cumulative, no ground of. *Ibid.*; *Wilkinson vs. Smith*; *Mills vs. State*, 609.
25. Even in case of capital punishment, verdict left to stand though some competent evidence was excluded, if it be perfectly clear that the con-

- viction and punishment would be no less rightful with the excluded evidence in than with it out. *Beck vs. State*, 351.
26. Court should not remark that evidence had been admitted *ex gratia* rather than by strict rules of law, but so doing is not necessarily cause for new trial. *McLendon vs. Frost*, 448.
 27. Slight errors in charge which could not have affected result, no ground of new trial even in capital case. *Williams vs. State*, 478.
 28. Motion overruled by different judge from one who presided, weight of opinion of latter in support of verdict, is wanting. *Shannon vs. State*, 482.
 29. Extraordinary ground to be presented after adjournment of court, discovery of evidence which is merely cumulative, and which would not even probably change result, not constitute. *Barber vs. Terrell*, 538.
 30. Where motion has been fully argued, too late to move to dismiss because order fixing time for hearing has run out. *Davis, adm'r, vs. Howard*, 607.
 31. The novelty of the case in some of its elements, justifies extraordinary care in working out the principles which control it; consequently discretion of court ordering new trial will not be controlled. *Ibid.*
 32. Where equity cause is tried irregularly and imperfectly, and result is not satisfactory to presiding judge, grant of new trial not controlled. *Dorbie et al. vs. Lockwood*, 608.
 33. Newly discovered evidence which is merely cumulative, and which tends only to impeach character of witness, no ground of. *Mills vs. State*, 609.

NOMEN DESCRIPTIONIS. See *Administrators and Executors*, 5.

NON-SUIT.

1. Diligence, question as to left to, jury; non-suit error where facts in evidence would justify inference of negligence. *Chisholm vs. Atlanta Gas-Light Company*, 28.
2. That cause of action was not set forth with sufficient clearness, no ground of non-suit. Remedy by special demurrer or by objection to testimony. *Jossey, Jr., vs. Stapleton*, 144.
3. Non-suit erroneously refused, but wanting link subsequently supplied, no ground for new trial. *Am. Life Ins. Co. vs. Green et al.*, 469.

PARENT AND CHILD.

1. Where declaration claimed damages for loss of services of minor son, who was injured on defendant's road, further allegation, to show aggravation, that death resulted, not change nature of action so as to make it suit for homicide. *Chick vs. Southwestern R. R. Co.*, 359.
2. Issue whether conveyance made by father to son, shortly before his death, for alleged consideration of \$500.00, and natural love and affection, was intended as advancement, or gift, or sale, competent to show that father returned land and paid taxes thereon, for year in which conveyance was made and prior thereto. *Tuggle vs. Tuggle, adm'r*, 520.
3. Competent to show what was value of father's estate at time of conveyance. *Ibid.*
4. Child claiming to share with husband in estate of deceased wife, must show affirmatively that descent was cast after act of 1871-'2. *Bailey, next friend, vs. Simpson, sheriff, et al.*, 523.

PARTIES. See *Ejectment*, 4, 5; *Practice in Supreme Court*, 25.

PARTITION.

1. Where tenant in common has mortgaged entire estate, equity may enjoin sale under foreclosure until after partition, especially where mortgagor is insolvent. *Hines et al. vs. Munnerlyn et al.*, 32.
2. Claim against co-tenant for profits arising from exclusive use, will form part of decree for partition and account, and will take precedence of mortgage made by him. *Ibid.*

PARTNERSHIP.

1. Dissolution had, in which one partner, for a consideration, agreed to pay firm debts; other may maintain bill for account as to firm assets remaining undisposed of in possession of former. *King vs. Coursen*, 11.
2. Notice of retirement must be given to protect partner from future contracts. *Holland vs. Long & Bro.*, 36.
3. When partner undertakes to perform distinct part of common business, he must know for himself whether he is discharging his duty or neglecting it. *Jowers vs. Baker*, 81.
4. Homesteads severally set apart to partners in partnership land, valid against creditor of firm. *Harris et al., adm'rs, vs. Visscher et al.*, 229.
5. Account in favor of firm, not matter to support bill by one member, where it does not appear that the other is dead, or has parted with his interest. *Frost vs. Shackleford et al., adm'rs*, 260.

PAYMENT.

1. Confederate money paid in April, 1865, both parties being ignorant of the surrender, good. *Ellis vs. Hammond, ex'r, et al.*, 179.
2. Where defendant in *f. fa.* placed claim in hands of plaintiffs' attorney, with instructions to collect and apply to *f. fa.*, and said attorney collected but failed to apply as directed, plaintiffs not bound to recognize such collection as payment to them. *Pease vs. Dibble & Bunce*, 446.
3. Creditor, in applying payment not applied by debtor, may credit it on just demand, whether correctness of such demand be assented to by debtor or not. *McLendon vs. Frost*, 448.
4. Right of creditor to apply payment, where no application is made by debtor, not defeated unless different understanding distinctly appears. *Ibid.*
5. After creditor has exercised right, jury will not apply payment differently. *Ibid.*
6. Where payments have been applied and bills rendered, showing both debits and credits, debtor may be bound by acquiescence, even though he did not previously fully understand and assent to each account. *Ibid.*
7. Payment without direction as to application, and creditor makes no appropriation, law will apply in such manner as is reasonable and equitable both as to parties and third persons. Generally oldest lien and oldest item in account will be first paid, but rule is not imperative. *Killorin et al. vs. Bacon*, 497.

PHYSICIANS. See *County Matters*, 2.

PLEADINGS.

1. Defense which is appropriate alone to plea cannot be presented by mere motion. *Killen vs. Compton et al.*, 63.
2. When pleadings show that consideration of contract is in part legal and

- in part void, on account of usury, and the plea attacks the whole as illegal, an amendment will be allowed, where the consideration is severable, making the plea applicable to the inadequacy of the consideration as to the usury. *Houser vs. Planters' Bank of Fort Valley*, 95.
3. That cause of action was not set forth with sufficient clearness, no ground of non-suit. Remedy by special demurrer or by objection to testimony. *Jossey, Jr., vs. Stapleton*, 144.
 4. Effect of judgment of supreme court, that no legal suits have ever been commenced, or legal judgments rendered, on notes, such prior proceedings cannot be pleaded as former recovery, or pendency of former suit, to subsequent actions, even though commenced before remittitur was made the judgment of the court below. *Gunnels vs. Deavours*, 177.
 5. If answer of sheriff to rule for failure to make money, be defective in not responding to specific allegations touching possession of certain property by defendant in *s. i. fa.*, objection is matter for special, not general, demurrer. *Davis, sheriff, vs. Reid et al.*, 188.
 6. Original pleadings lost, copy established, instanter, on motion. *Eagle & Phenix, Man. Co., vs. Bradford, trustee*, 249.
 7. That they were not recorded is no reason for not establishing copy. *Ibid.*
 8. Copy of official transcript preserved in office of clerk of supreme court, is sufficient evidence as to contents of lost papers. *Ibid.*
 9. With such high evidence, the motion may be granted without notice to any one. *Ibid.*
 10. Action by husband for *tort* committed to wife, latter may be joined, notwithstanding section 2960 of Code. *East Tenn., Va. and Geo. R. R. Co. vs. Cox et ux.*, 252.
 11. To recover triple damages for injury to animals, under section 1445 of Code, plaintiff must sue for such ; it must also be alleged that defendant's enclosure was not protected as the law requires. *Lee vs. Nelms*, 253.
 12. On appeal from judgment at common law, rendered in 1860, court has no power to enter up judgment against defendant and security on appeal, in 1874, without intervention of jury, though no defense be filed on oath. *Walker et al. vs. Bivins, et al.*, 322 ; *Birdsong vs. Woodward, for use*, 354.
 13. Clerical error in date of filing entered on declaration, amendable by date of process, fortified by return of service. *City of Atlanta vs. Grant, Alexander & Co.*, 340.
 14. Plea which sets up agreements not contained in note, and in contradiction thereof, properly stricken. *Goodman vs. Fleming*, 350.
 15. Where declaration claimed damages for loss of services of minor son, who was injured on defendant's road, further allegation, to show aggravation, that death resulted, not change nature of action so as to make it for homicide. *Chick vs. Southwestern R. R. Co.*, 357.
 16. Where statement of fact shows case of felony, and there was no allegation that prosecution had been instituted therefor etc., a demurrer was properly sustained. *Ibid.*
 17. Defendant's sworn plea may, in argument, be commented on as sworn statement, and may be compared with his testimony to disparage it. *McLendon vs. Frost*, 448.
 18. Attorneys ruled for money collected, and not for failing to collect, not held to answer, on that rule, for more than sum actually collected. *Langmade & Evans vs. Glenn et al.*, 525.

19. Special pleas to ejectment which present no sufficient defense, ought to be stricken. *Broach vs. Barfield et al.*, 601.

POSSESSION. See *Deeds*, 5.

POWERS. See *Municipal Corporations*, 7.

PRACTICE IN THE SUPERIOR COURT.

1. Judgment by default, whether it shall be set aside, addressed to sound discretion of court below. *Lambert vs. Smith*, 25.
2. Attention of court below should be called to unfair representation of testimony by counsel, otherwise this court will not interfere. *Mayo vs. Walden*, 42.
3. Motion to dismiss because matter had been adjudicated in former suit, not available unless former adjudication appears on face of declaration. *Killen vs. Compton et al.*, 63.
4. When the judge can find no obscurity in the date of an instrument, he may say so, and read the date aloud in the hearing of the jury, the instrument being in evidence. *City B'k of Macon vs. Fristie, Roberts & Co.*, 283.
5. The judge may speak with a witness in an undertone, in the presence of the jury. *Ibid.*
6. The judge may ask counsel a pertinent question during the cross-examination of an expert, even though the effect be to put the witness upon his guard, by disclosing to him a fact which the counsel wished him not to know. *Ibid.*
7. When even a party is under cross-examination, the court may exercise a sound discretion in requiring counsel to make the relevancy of his questions apparent. *Ibid.*
8. Courtesy proper between court and counsel. *Ibid.*
9. Separation of witnesses ordered, exceptions are discretionary. *Ibid.*
10. That two days had been consumed in trial of motion to vacate judgment, made by one of two defendants, after which it was voluntarily dismissed, no ground for dismissal of another motion, made by both defendants, especially if additional grounds be set out. *Walker et al. vs. Bivins et al.*, 322.
11. On appeal from judgment at common law, rendered in 1860, court has no power to enter up judgment against defendant and security on appeal, in 1874, without intervention of jury, though no defense be filed on oath. *Ibid.; Birdsong vs. Woodward, for use*, 354.
12. Court not bound to give effect to written consent of counsel as to the order, or the time, of trying cases. *Mayor etc., of Griffin et al. vs. Inman, Swann & Co.*, 370.
13. Case called for trial in its order, and another case standing upon a different docket is tried with it, by consent, plaintiff in first is entitled to open and conclude. *Ibid.*
14. When examination of witness is apparently more minute than necessary, court may inquire why examination should proceed in that way; and, in so doing, may state what is admitted by the party, and what appears upon the face of certain writings to which examination relates: *McLendon vs. Frost*, 448.
15. Court should not remark that evidence had been admitted *ex gratia*, rather than by strict rules of law. *Ibid.*
16. When, at ten o'clock at night, there is a tired juror, court and counsel may confer in his presence on question of adjournment. Not error

- for court to adjourn when counsel consent, and when arrangement agreed upon, as to time, is satisfactory to all concerned. *Ibid.*
17. When usury is in question, and plaintiff's counsel, during the trial, offers to take ten per cent., not error for court to inquire if that rate is satisfactory. *Ibid.*
 18. Discretion of court in matters of practice. *Ibid.*
 19. Better practice not to read aloud requests to charge which court intends to refuse. *Ibid.; Beach & Co. vs. Branch, Sons & Co.*, 362.
 20. Non-resident judge presided during trial; whilst jury was out, counsel, in presence of judge who was about to depart, agreed that verdict might be returned to clerk subject to formal correction; subsequently, whilst resident judge was presiding, jury returned verdict finding gross sum for plaintiff; the judge required principal and interest separated. No error in arrangement made for return of verdict, in the manner in which it was received, or in amendment required by court. *Ibid.*

PRACTICE IN THE SUPREME COURT.

1. Certificate to fact by clerk which he had no authority to certify, not considered. *Lambert vs. Smith*, 25; *Middlebrooks, adm'r, et al. vs. Middlebrooks, guardian*, 193.
2. Where certificate to fact which clerk was not authorized to certify, was embraced in certificate to fact which was within clerk's authority, both must be considered. *Jackson, Judge*. *Ibid.*
3. The successor to the judge who presided, may authenticate grounds of new trial taken before himself. *Watkins vs. Paine*, 50.
4. Charge, as a whole, not inapplicable, the inapplicability of some parts will not avail on general objection. *Ibid.*
5. Judgment affirmed on condition that plaintiff writes off amount to which he was not entitled. *Harris et al. vs. Dub*, 77.
6. Though judgment striking plea is affirmed, yet opportunity is given to defendant to amend. *Houser vs. Planters' Bank of First Valley*, 95.
7. Where record contains neither pleadings, verdict nor judgment, writ of error dismissed. *Bean & Co. vs. Hadley*, 100; *McAndrew vs. Aug. M. L. Association*, 607.
8. Request to charge set out as ground of motion for new trial must be verified. *McDade vs. Hawkins et al.*, 151.
9. To reverse judgment refusing discharge of prisoner after demand for trial, it must affirmatively appear that there were juries impaneled and qualified to try at both terms. *Roeback vs. State* 154.
10. Recital in motion for discharge, which was refused, that there was jury at second term, with no verification by judge, not sufficient evidence thereof. *Ibid.*
11. Bill of exceptions and record conflict as to matter pertaining to record, latter controls. *Ibid.*
12. Where bill of exceptions was not served until after expiration of ten days from certificate of judge, writ of error dismissed. *Bradley et al. vs. Sadler et al.*, 191.
13. That such paper was sent to the clerk's office by counsel living in an adjoining county, and filed on the fourth day after it was certified, and associate counsel, living in county of suit, asked the clerk several times for the papers, within time to perfect service, who replied that they had not come, will not prevent dismissal. *Ibid.*
14. Whether a bill of exceptions may be filed before service; and whether, having been filed, it can be withdrawn to perfect service? *Quere*. *Ibid.*

15. Consent order taken allowing given time within which motion for new trial and brief of evidence may be perfected, and neither presented to judge within the specified time, he had no jurisdiction to entertain the motion, and writ of error to his judgment will be dismissed. *Middlebrooks, adm'r, et al., vs. Middlebrooks, guardian*, 193.
16. Explanatory note by clerk, in transcript of record, by which it is sought to show that order, as appeared on minutes, was subsequently changed as to time, not considered. *Ibid.*
17. Minutes of court below, as certified by clerk, taken as correct. Extraneous testimony of clerk and counsel, showing that minutes did not speak the truth, not considered. *Ibid.*
18. Where writ of error was dismissed upon ground that judge had no jurisdiction to entertain the motion after the time appointed in the consent order had elapsed, the case will not be reinstated even though opposing counsel made no objection thereto, and though counsel, at whose instance the dismissal took place, would not have made the motion had he been apprised of an agreement between his associate and counsel for plaintiffs in error, extending such time. *Ibid.*
19. Where the judgment excepted to was in favor of the solicitor, clerk and sheriff, specifying amount to be recovered by each, and bill of exceptions only shows service on the "defendant," writ of error dismissed. *Curey vs. Hitch, sol. gen., et al.*, 197.
20. Grounds of motion for new trial must be certified to be true or they will not be considered. *Kent & Co. et al. vs. Plumb, trustee, et al.*, 207.
21. Refusal to hear motion for new trial read when rule *nisi* is granted, if error at all, cannot be excepted to on writ of error to refusal of motion at subsequent term. Exception should be entered *pendente lite*. *City Bank of Macon vs. Kent*, 283.
22. On argument of motion, although judge may announce that some of the recitals are incorrect, he is not legally bound to point out errors, but may adjudicate upon the motion as he finds it, noting errors in final order or in certificate to bill of exceptions. *Ibid.*
23. Exception to whole charge not sustained unless whole charge is wrong. *McLendon vs. Frost*, 448.
24. Record purports to present claim case, but no affidavit or bond appears, court cannot reverse judgment finding property subject, especially where such judgment is not sent up. *Traynham vs. Perry & Denton*, 529.
25. Where party to collateral issue is dead, and representatives not before court, supreme court will not, on writ of error by person not then party to case, examine proceedings had upon trial of such issue. *Gardner, trustee, et al., vs. Granniss, adm'r*, 539.
26. Exceptions to rulings not taken in court below, and not stated as grounds of motion for new trial, not considered though set forth in bill of exceptions. *Irwin vs. Corbin*, 594.
27. Record fails to disclose any judgment rendered in court below, damages not awarded for bringing case up for delay only. *Dosier et al. vs. Williams*, 600.

PRESCRIPTION.

1. Possession of land, subject to over-flow from the back-water of a dam, for seven years, under color of title, without its having been over-flowed on account of the defective condition of the dam, not relieve land from such servitude. *Maguire vs. Baker et al.*, 109.

2. Widow claiming title by prescription as against judgment *vs.* husband, under deed from third person, made during husband's life, must show that her possession was adverse to that of husband. *Hill vs. Waldrop*, 134.
3. Error to instruct jury to strike out certain years from defendant's adverse possession, but if entire proof fails to make out prescriptive title, no harm is done, *Thursby vs. Myers*, 155.
4. Though understanding be that tenant shall hold for certain time, yet if he vacates, such understanding will not render possession continuous. *Ibid.*
5. Mortgagor, *bona fide* purchaser for value from, with seven years' possession, takes free from encumbrance of mortgage not recorded in time, he having neither actual nor constructive notice of same. *Parker, ex'x, vs. Jones et al.*, 204.
6. Possession of part of land covered by deed, will embrace whole tract described therein, whether it be one lot or a number of lots. *Ibid.*
7. Assumpsit, prescription inapplicable to. *Harral vs. Wright et al., ex'rs*, 484.
8. Where person claiming to be owner is brought in as defendant to ejectment which was instituted against his overseer, prescription is measured by length of possession prior to suit, without adding time which elapsed from then until landlord was made a party. *Gardner, trustee, et al., vs. Grannis, adm'r*, 539.

PRESUMPTIONS.

1. That landlord sent for keys some time in August, and never tendered them back, presumptive of possession and dominion at that time and thereafter. *Harris et al. vs. Dub*, 77.
2. Exceptions to charge, none taken, presumption follows that jury was properly instructed. *Jordan vs. Ingram*, 92; *Epping vs. Tunstall et al.*, 267.
3. Exemplified copy of will from ordinary's office is presumptive proof that it was properly recorded. *Thursby vs. Myers*, 155.
4. Devisee and executrix same person, assent to devise presumed. *Ibid.*
5. Execution presumed to follow judgment on which it was founded. *Freeman vs. Binswanger*, 159.
6. New note given for less sum than old, in renewal thereof, is presumptive evidence that all differences were adjusted. *Piper et al. vs. Wade, adm'r*, 223.
7. To rebut such presumption, there must be clear and satisfactory evidence that both parties agreed and intended that the settlement made when new note was given, was not final. *Ibid.*
8. If debtor, recently after conveying to claimant, is in possession, and so continues until levy, possession presumed to have existed at date of conveyance. *Collins vs. Taggart*, 355.
9. Without stipulation in contract, or some averment in pleadings, no presumption that note to guardian, dated in 1863, and due in 1864, was, of right, payable in Confederate money. *Bonner, guardian, vs. Nelson*, 433.
10. Larceny established, fact that stolen goods were immediately thereafter found in possession of defendant, presumptive evidence of guilt. *Tucker vs. State*, 503.

PRINCIPAL AND AGENT.

1. Contract by general agent of insurance company, charged with duty of

appointing sub-agents, whereby he obligated the company to pay a fixed sum per month, is the contract of the company. *Cotton States L. Ins. Co. vs. Mallard*, 64.

2. That the charter vests this duty in the general agent, "subject to the approval of the officers of the company," does not render such approval a condition precedent to the contract. *Ibid.*
3. Sub-agent is not bound by private contract between the company and general agent, but is bound by provisions of charter. *Ibid.*
4. Voluntary *tort* committed by servant in prosecution and scope of business, master liable for; but there should be sufficient evidence that it was committed in scope of such business. *Lee vs. Nelms*, 253.
5. Admission by servant of past wrongful act, not evidence against master. *Ibid.*
6. When an agent, having power of attorney to collect any and all moneys due or to become due his principal from any source, and especially a certain claim, to give receipts for the same, to apply portions of such moneys to debts of the principal, and generally to do and perform any other acts in and about said business that may be deemed necessary or proper, deposits in bank, to the principal's credit, some of the money arising from the claim specially mentioned in the power, and afterwards, during the existence of the agency, draws out the deposit on checks purporting to be signed by the principal, and believed by the officers of the bank to be genuine, the bank is discharged, whether the checks be in fact genuine or not. They are, in effect, acquittances in the name of the principal. *City Bank of Macon vs. Kent*, 283.
7. Agency continues so long as the power is not revoked and the business not withdrawn from agent's control. *Ibid.*
8. If ratification were necessary, it could take place after knowledge that money was drawn out by agent, though ignorant that he had used false checks. On question of discharge of bank, the receipt of the money by the agent was the act needing ratification, and not the execution of the checks. *Ibid.*
9. Ratification might be inferred from receiving money from the agent with knowledge that he had drawn it from bank, or from consenting to its use by him. *Ibid.*
10. Aside from any question of authority, ratification or knowledge, any of the money paid by the bank to the agent, which the latter delivered to the principal, or retained with her consent etc., would be a credit to the bank on the deposit account, unless thus to follow the fund and to apply it, would violate some peculiar equity. *Ibid.*
11. Receipts in full to agent are evidence tending to prove ratification. Such documents are open to explanation, and what they prove in the end is for the jury to decide. *Ibid.*
12. If checks of various amounts are mixed together without the fault of either party, two being genuine and the rest false, and if the former cannot be distinguished from the latter by any evidence before the jury, the jury should not disallow all the checks for want of greater certainty in identification, but should apply the principle of average, or some other, so as to approximate justice. *Ibid.*
13. Notice to agent is notice to principal. *Hayden vs. Anderson et al.*, 378.

PRINCIPAL AND SECURITY.

1. Execution against principal and security, plaintiff may proceed against property of either. *Manry et al. vs. Shepperd*, 68.
2. Exception to this rule, established in sections 1819, 2508, 3387 of Code,

as to judgments recovered on bonds of administrators, executors, or guardians, not apply to judgment founded on bonds of other trustees. *Ibid.*

3. Dismissal of levy on principal's land, no obstacle to enforcing execution against property of surety. *Ibid.*
4. After affirmance in the supreme court, plaintiff not obliged to enter up judgment against surety on *supersedeas* bond, before taking out execution against the defendants in the original judgment. *Ibid.*
5. A surety included in irregular judgment cannot resist amendment by setting up facts constituting discharge. Such defense is as valid against the corrected judgment as against it uncorrected. *Pryor et al., adm'r, et al., vs. Leonard, 136.*
6. Liability of surety resisted on ground that he left note with principal, believing and expecting that another surety would sign also, but whose signature was not procured, the defense must comprehend the two elements, of incompleteness of instrument, and notice thereof to payee. *Bonner, guardian, vs. Nelson, 433.*
7. For plaintiff to reject tender of Confederate money by principal, in 1864, the note being dated in 1863 and due in 1864, and for him to discourage the pressing of the tender by naked promise not to call for payment until after the close of war, not wrongful to surety. *Ibid.*
8. Such promise, made and kept without the surety's knowledge or consent, did not discharge him, notwithstanding the principal was solvent when the promise was made, and afterwards became insolvent. *Ibid.*

PRODUCTION OF PAPERS. See *Evidence, 31, 32.*

PROMISSORY NOTES. See *Negotiable Securities, 1, 2, 10-12, 16.*

RAILROADS.

1. Where goods, received for as in good order by first of connecting line, are delivered in damaged condition to consignee, last road may show that, though *apparently* in good order, they were damaged before shipment. *Cent. R. R. and B'k'g Co. vs. Rogers' Sons, 336.*
2. A chartered railroad, with all rights and privileges that properly appertain to it as an instrument of transportation, (excluding, of course, the franchise of the corporation to be a body politic,) is property, subject to sale, in this state, under a judgment at law. *City of Atlanta vs. Grant, Alexander & Co. et al., 340.*
3. But the judgment, and the execution thereon, must but be specially moulded, in substantial compliance with sections 3082, 3562, 3639 of Code. *Ibid.*
4. A sale under an execution not thus moulded, may be arrested by illegality. *Ibid.*
5. Such a sale, though consummated without legal resistance, would be void; and consequently, neither the rights of other creditors, nor of the stockholders, would be lost. *Ibid.*
6. Under act of 1870, Western and Atlantic Railroad Company is only liable to be sued as corporation, for damages sustained on line of its road. *WARNER, C. J. Gallaway vs. West. and At. R. R. Co., 512.*
7. Where employee assumes all risk incident to employment, fact that he was running over another road at time of injury, not release him from such agreement. *WARNER, C. J. JACKSON, J. Ibid.*
8. Employee is in fault when he knowingly exposes himself to extraordinary danger at night, by assisting to carry a train over the unsafe track of another railroad. *BLECKLEY, J. Ibid.*

9. When employee receives and retains money from company which employed him, on faith of statement by him that he did not mean to sue for damages, he is estopped from suing. *Ibid.*

RATIFICATION. See *Principal and Agent*, 7-21.

RECEIPTS. See *Principal and Agent*, 11.

RECEIVER.

1. Suit not maintainable against, without leave of the appointing court. *deGraffenreid vs. Screeven, receiver*, 22.
2. Interlocutory decree authorizing sale, sale by receiver valid. *Walters, ex'x, et al., ex'rs, vs. Montgomery, receiver*, 501.
3. Representation by receiver that land was free from incumbrance, was the truth, if, though the land be levied on under *f. fa.* against former vendor, the jury, on trial of claim, find the same not subject, especially if levy was proclaimed at sale. *Caveat emptor* applies with double force. *Ibid.*
4. Under circumstances of this case, fund in hands of receiver of state court, less expenses, ordered turned over to trustees in bankruptcy. *Seligman et al., trustees, vs. Ferst & Co. et al.*, 561.

RECOUPMENT. See *Set-off and Recoupment*.

REGISTRY. See *Deeds*, 3, 4, 7, 10.

RENEWAL OF SUIT. See *Limitations—Statute of*, 1.

ROADS AND BRIDGES. See *County Matters*, 3-5.

SALES.

1. Delivery to carrier according to usage of trade, will be delivery to purchaser who orders shipment but specifies no particular carrier or class of carriers, and after notice of shipment, makes no objection to carrier selected. *Watkins vs. Paine*, 50.
2. Purchaser retaining good for nearly two months, without notice of rejection because not coming up to order, appropriation of part by sale thereof, will be appropriation of whole, so far as to render him liable for real value, not exceeding contract price. *Ibid.*
3. Failure to point out overcharges in bill for goods which defendants refused to take, not render them liable for difference between what goods brought on sale by plaintiffs at a sacrifice, and the amount charged in the bill. *Kaufmans vs. Austin & Co.*, 87.
4. Title obtained by fraud, though voidable in vendee, protected in *bona fide* purchaser from him. *Kern & Loeb vs. Thurber & Co.*, 172.
5. Where one, in trading property, says he will warrant it to be sound in every respect, his declaration may amount to a representation as well as to a warranty. *Larey vs. Taliaferro*, 443.
6. Express warranty, knowingly false, may be waived as a contract and action be brought for deceit. *Ibid.*
7. One who knowingly trades property afflicted with contagious disease, not entitled to any notice, when existence of disease is afterwards discovered by purchaser. *Ibid.*
8. Sales wholly on the authority, written or verbal, of defendant, and wholly on his credit, he is an original debtor, and the law of promise to answer for debt of another is inapplicable. *McLendon vs. Frost*, 448.

9. When commodity is to be paid for by the bushel to the extent of a cargo for a certain vessel, parties may, by mutual consent, upon being interfered with by an officer, stop lading with less than a cargo on board; delivery will be complete as to so much as is actually on vessel. *Wilson, sheriff, vs. Paulsen & Co.*, 596.

SAW-MILL LIEN. See *Lien*, 1-5.

SCALING ORDINANCE.

1. Contract, whether for loan or bailment of Confederate money, made on December 24th, 1864, is within ordinance of 1865. *Roberts, Dunlap & Co. vs. Graybill*, 118.

SERVICE.

1. Under Code, service must be fifteen days before first day of term. If effected on the second Monday before the commencement of court, it is not in time. *Hood vs. Powers*, 244.
2. Sheriff's entry conclusive until traversed and found untrue by jury. *Davant et al., ex'rs, vs. Carlton*, 489.
3. After service, appearing, and pleading to merits, too late for defendant to object to manner in which he has been brought into court. *Gardner, trustee, et al. vs. Granniss, adm'r*, 539.

SERVITUDE. See *Vendor and Purchaser*, 1.

SET-OFF AND RECOUPMENT.

1. Running payments and over-payments on account, pleaded as set-off to account sued on, where plea admits latter to certain amount but disputes balance; and if plea be sustained by evidence judgment recovered for excess. *Petit vs. Teal*, 145.
2. Note or account cannot be pleaded as set-off to judgment so as to arrest execution thereon. *Hawkins vs. County of Sumter*, 166.
3. Negotiable note of laborer, bought up by employer after contract of hiring, no defense to summary process for enforcing lien. *Fuller vs. Kitchens*, 265.
4. When suit is on notes and set-off is pleaded, plaintiff may show payment of debt claimed in set-off. *McLendon vs. Frost*, 448.

SETTLEMENT. See *Compromise and Settlement*.

SHERIFF.

1. Attachment for contempt cannot be had against sheriff, even after rule absolute, without rule *nisi*. *Wheeler, sheriff, vs. Harrison*, 24.
2. But rule *nisi* calling upon him to show cause why he does not pay the money, may also embrace rule *nisi* for attachment. *Wheeler, sheriff, vs. Thomas*, 161.
3. Illegality based on sheriff's, or deputy's, neglect, insufficient answer to rule for failure to make money. *Ibid.*
4. That *si. fa.* has been paid off in whole or in part, thus decreasing injury to plaintiff, sheriff may show. *Ibid.*
5. Answer that sheriff could find no property of defendant on which to levy, and that therefore he returned *nulla bona*, is sufficient in substance. *Davis, sheriff, vs. Reid et al.*, 188.
6. If answer be defective in not responding to specific allegations, objection is matter for special, not general, demurrer. *Ibid.*

SOLICITOR GENERAL. See *Costs*, 1.

STOCKHOLDERS. See *Corporations*, 4-8, 10-15, 17-19.

STREETS. See *Municipal Corporations*, 1, 2.

SUBSCRIPTION TO STOCK OF RAILROADS. See *Municipal Corporations*, 4-9.

SUICIDE. See *Insurance*, 4.

SUNDAY. See *Contracts*, 9.

TAX. See *Municipal Corporations*, 3.

TENDER.

1. Confederate money bailed, not loaned; tender after war closed unnecessary. *Roberts, Dunlap & Co. vs. Graybill*, 117.
2. To redeem land held by absolute title as security for debt, debt must be paid or tendered; and, generally, tender will be effective, though delayed until after creditor has recovered possession. *Broach vs. Barfield et al.*, 601.

TORTS.

1. Company which produces gas is bound to use such diligence as is proportionate to the delicacy etc., of that particular business. *Chisolm vs. At. Gas-Light Co.*, 28.
2. Diligence, question as to left to jury; non-suit error, where facts in evidence would justify inference of negligence. *Ibid.*
3. Where mill-dam, on account of defective condition, does not back water to extent of full capacity, owner has a right to build new one of same height, or to repair old one, without becoming liable for damages caused by increased over-flow. *Maguire vs. Baker et al.*, 109.
4. In action of trover against administrator, who converted property since death of intestate, verdict and judgment against "defendant" are correct, and the use of the word "administrator" in the execution is merely *descriptio personae*. *Bagley vs. Roberson*, 148.
5. Party in possession of personal chattel may recover value from any one who wrongfully dispossesses him. *Gillespie vs. Chastain*, 218.
6. *Torts* committed on wife, in actions for, wife may be joined with husband notwithstanding section 2960 of Code. *East. Tenn., Va. & Ga. R. R. Co. vs. Cox et ux.*, 252.
7. Voluntary *tort* by servant in scope of business, master liable for, but evidence that it was committed in the scope of such business should be sufficient. *Lee vs. Nelms*, 253.
8. Subsequent marriage of widow not divest her of right to sue for homicide of first husband. *Geo. R. R. & B'k'g Co. vs. Garr*, 277.
9. Nor will it affect measure of damages. *Ibid.*
10. Where declaration claimed damages for loss of services of minor son, who was injured on defendant's road, further allegation, to show aggravation, that death resulted, not change nature of action so as to make it suit for homicide. *Chick vs. Southwestern R. R. Co.*, 357.
11. Where statement of facts amount to *prima facie* case of felony, and there was no allegation that prosecution had been instituted etc., demurrer was properly sustained. *Ibid.*
12. Imprisonment under bail process, issued in action of trover for person-

alty, is not in violation of provision in constitution of 1868, which declares that there shall be no imprisonment for debt. *Harris vs. Bridges*, 407.

13. Inability of defendant to produce property, on return of *habeas corpus*, issued at his instance, not authorize discharge. *Ibid.*
14. Express warranty, knowingly false, waived as contract and action brought for deceit. *Larey vs. Taliaferro*, 443.

TROVER. See *Torts*, 4, 5, 12, 13.

TRUSTS.

1. Junior judgment for money, based on conversion of trust property, not entitled to priority over older judgments in distribution of fund brought in under garnishment. *Mendleson vs. Pardue, trustee*, 202.
2. If trustee sells real estate settled upon wife and minor son, and takes note on insolvent husband and partner, in order to obtain credit for firm by paying their debt, and if the purchaser acted as agent in thus collecting the debt of the husband's creditors, the trustee is guilty of breach of trust, the purchaser is *particeps criminis* and gets no title, even though the trustee be authorized to sell by the wife's direction, and she does direct the sale. *Kent & Co. et al. vs. Plumb, trustee, et al.*, 207.
3. Income to be paid annually to beneficiary during his life, *corpus*, on his death, to be turned over to his children; if he should leave no children, then remainder over, with discretionary power in trustee to sell and to reinvest as in his judgment shall be for the benefit of said trust estate, with option to make returns or not; provisions constitute valid, subsisting, executory trust, and the legal title remains in the trustee. *Thomas & Co. vs. Crawford, trustee*, 211.
4. That beneficiary, with the consent of the trustee, took possession with the understanding that he was to receive the rents etc., in discharge of the legacy due him, did not subject the *corpus* to be sold for the life of the beneficiary, under an execution against him. If usufruct be subject at all to his debts, it is only in equity. *Ibid.*
5. Individual notes of trustee and of one of beneficiaries, not charge trust estate, although given for supplies for benefit of trust, and although creditor looked to estate for payment. To charge estate, claim should be based on account. *Frost vs. Shackleford et al., adm'rs*, 260.
6. Though right of action against trustee accrued prior to 1865, still complainants are not barred by act of 1869, if defendant acted fraudulently and corruptly; but whether he so acted is question for jury, and not simply illegal conduct must be shown, but moral turpitude and intentional fraud. *Lake, trustee, vs. Hardee et al.*, 459.

UNITED STATES COURT. See *Constitutional Law*, 1.

USURY.

1. Is corporation, without authority to issue bills as money, a bank, in the sense of the act of 1857 etc., so as to make all contracts for loan of money at a greater interest than seven per cent. per annum, null and void? *Houser vs. Planters' Bank of Fort Valley*, 95.
2. Though such were the character of this corporation, yet the money actually borrowed, with legal interest thereon, is good consideration to support promise made after repeal of laws against usury, to pay such sums. *Ibid.*
3. To find that contract made and to be performed in foreign state, was void for usury, evidence must show that rate of interest was in excess

of that allowed by law in such foreign state. *Mayor etc., of Griffin et al. vs. Inman, Swann & Co.*, 370.

4. In 1874, there was no law making usurious any agreement, written or verbal, for any rate of interest whatever. *Broach vs. Barfield et al.*, 601.

VENDOR AND PURCHASER.

1. Land sold in separate tracts; upon first there is mill and dam; purchaser obtains right to use the same to extent of their capacity, and adjoining tracts are subject to such servitude. *Maguire vs. Baker et al.*, 109.
2. Whilst it is true that when both parties have equal opportunity to examine lands, equity will not relieve on account of misrepresentation of seller, yet where the facts set forth in the plea show fraud in the procurement of the purchaser's signature to the contract, such plea should not be stricken. *Gilbert vs. Cherry*, 128.
3. Plea that contract for sale of land was drawn by attorney of vendor, and by fraud or mistake, did not express real contract of parties, setting forth facts and praying reformation, should not be stricken. *Ibid.*
4. Plea that seller deceived purchaser as to incumbrances, and that he is unable to make good title, should not be stricken. *Ibid.*
5. Where purchaser fails to comply with contract, measure of damages i difference between the price agreed upon, and the depreciated value at time contract was broken and notice thereof given to seller. Speculative profits etc., which might have been made, should not be considered. *Ibid.*
6. If vendor conveys before he has title, and subsequently acquires title, it ensues immediately to benefit of vendee. *Thursby vs. Myers*, 155; *Parker, ex'x, vs. Jones, et al.*, 204.
7. Title obtained by fraud, though voidable in vendee, protected in bona fide purchaser from vendee, without notice. *Kern & Loeb vs. Thurber & Co.*, 172.
8. Where, to ejectment by vendor against vendee who has made default in payment, a third person is made a party defendant, deed offered by her showing title out of plaintiff, and to explain her possession, admissible. *McAlpin et al. vs. Lee*, 281.
9. That plaintiff proved claim for purchase money in bankrupt court, as against estate of vendee, not prevent recovery. *Ibid.*
10. Administrator who sold and conveyed prior to adoption of Code, entitled to vendor's lien. *White vs. Reviere, adm'r*, 386.

VENUE. See *Jurisdiction*, 1.

VERDICT.

1. The issues made by the pleadings were sufficiently disposed of by the verdict to authorize a decree thereon. *Tift, adm'r, vs. Hartwell, ex'r*, 47.
2. Ejectment brought by S. against T. Mrs. T. filed bill to enjoin, alleging that S., her brother, had purchased land for her, he to hold title until repaid; that, in the meantime, she and her family were to have possession during her life, and at her death it was to pass to her children. Upon the trial of the two cases together the jury found that upon payment of certain sum to defendant, he should execute to complainant deed in fee simple: *Held*; that the verdict is too general; notice should have been taken of the life-tenancy and the remainder. *Scott vs. Taylor et al.*, 168.

3. When a verdict may, by reasonable construction, be understood, and a legal judgment can be entered thereon, it is sufficient. *Williams, Birnie & Co. vs. Brown, sheriff, et al.*, 304.
4. Verdict amendable, where returned, by separating principal and interest, though jury dispersed after agreeing upon same. *Collins & Son et al. vs. Bullard*, 333.
5. Where verdict in equity cause found for complainants specific sum of money, decree by chancellor, simply adopting and approving verdict, not illegal. *Hayden vs. Anderson et al.*, 378.
6. Verdict in equity cause should be so certain, both as to principal and interest, that decree may harmonize with it, otherwise a new trial is necessary. *Lake, trustee, vs. Hardee et al.*, 459.
7. Action on contract submitted without any issuable defense on oath, in presence of defendant and his counsel, and after introduction of testimony, amount of verdict agreed on, verdict returned accordingly is not a nullity, but will support judgment entered in ordinary form. *McNulty et al. vs. Marcus*, 507.
8. In directing jury as to form of verdict on exceptions to master's report, not error for court to say that jury should find for or against each exception. *Dillard et al. vs. Ellington, adm'r*, 567.

WARRANTY. See *Sales*, 5-7.

WILLS.

1. Exemplified copy of will from ordinary's office is presumptive proof that it was properly probated. *Thursby vs. Myers*, 155.
2. Devisee and executrix same person, assent to legacy presumed. *Ibid.*
3. Will admissible as muniment of title though letters testamentary be not produced, the ordinary certifying that such had issued. *Ibid.*
4. Bequest of \$500.00 to grand-son, to be paid when he attained majority ; subsequent provisions referred to property not heretofore disposed of ; executors set apart notes to meet legacy, which subsequently became valueless : *Held*, that if there were enough assets in hands of executors to pay legacy when grand-son attained majority, they were liable therefor, notwithstanding loss of notes. *Montgomery et al., ex'rs, vs. Robertson*, 258.
5. Issue as to whether deed made by testator was forgery, will subsequently executed, which fails to dispose of such property, admissible to show non-claim. *Gardner, trustee, et al., vs. Granniss, adm'r*, 539.
6. There being, in a will, a mixed bequest and devise of specific personality and specific realty, to the executor, in trust for two daughters during their lives, and at their death, to their children, respectively ; the property to be subject to the debts of no person, and to be managed by the executor until the elder daughter became of age, or married, and then to be equally divided ; and if either daughter died without child, such property to revert to, and belong to, the other sister ; and the residuary clause, gave directly to the same two daughters, in equal shares when distributed, all the residue, the whole fee in the subject matter of the specific devise and of the specific bequest passed out of the testator at his death. *Dillard et al. vs. Ellington, adm'r*, 567.
7. Neither of the daughters having married or had children, on death of younger after elder became of age, deceased transmitted to heirs no estate in any of property embraced in specific devise and bequest ; as to that, survivor, from thenceforth, stood as if she had been alone, originally, in both clauses of will. *Ibid.*

8. Devise which was obviously contingent when will was made, is not, upon failure of contingency, within ordinary rule as to void or lapsed legacy; and the residuary legatee will take instead of the heir-at-law. *Ibid.*

WITNESS.

1. Opinion of witness experienced in use of gun, as to length of time since weapon was discharged, admissible in connection with facts on which it is founded. *Moughon vs. State*, 102.
2. In suit between administrator, who sues for use, and defendant, latter is competent witness to testify to identity of a paper alleged to have been sold by the administrator at public sale and bought by defendant. His testimony should be excluded only as to transactions between himself and intestate. *Sheibley vs. Hill, adm'r, for use*, 232.
3. Instrument attested by subscribing witness, inadmissible except upon proof of execution by such witness, unless absence has been satisfactorily accounted for. *McAlpin et al. vs. Lee*, 281.
4. Impeached, in charging how witness may be, error to specify, as one of the modes, evidence of general bad character, when there is no such testimony. *City Bank of Macon vs. Kent*, 283.
5. Error to charge, in general terms, that witness may impeach himself "by confession to infamous conduct, which, if true, would exclude him from respectable society." *Ibid.*
6. The judge may speak with a witness in an undertone, in presence of the jury. *Ibid.*
7. The judge may ask counsel a pertinent question during the cross-examination of an expert, even though the effect is to put the witness upon his guard by disclosing to him a fact which the counsel wished him not to know. *Ibid.*
8. When even a party is under cross-examination, the court may exercise a sound discretion in requiring counsel to make the relevancy of his questions apparent. *Ibid.*
9. Separation of witnesses ordered, exceptions are discretionary with court. *Ibid.*
10. Where examination is apparently more minute than necessary, court may inquire why examination should proceed in that way; and, in doing so, may state what is admitted, and what appears upon the face of certain writings to which examination relates. *McLendon vs. Frost*, 448.
11. Two witnesses to transaction and evidence irreconcilable, jury must determine which is entitled to most credit, and return verdict accordingly. *Killorin et al. vs. Bacon*, 497.



